MISSISSIPPI LAW JOURNAL

ARTICLES

THE MISSISSIPPI BUSINESS CORPORATION ACT: DOES THE MISSISSIPPI VERSION LIME THE BUSHES?
E. Clifton Hodge, Jr. and Alan W. Perry

EMPLOYER SPEECH DURING UNION ORGANIZATIONAL CAMPAIGNS
Charles Claiborne Barksdale

COMMENTS

MORTGAGES TO SECURE FUTURE ADVANCES: PROBLEMS OF PRIORITY AND THE DOCTRINE OF ECONOMIC NECESSITY

AN ANALYSIS OF MISSISSIPPI'S COOLING-OFF LEGISLATION

CONTROL OR CARTE BLANCHE? MISSISSIPPI LICENSES CHIROPRACTIC

VOLUME 46 **SUMMER 1975** **NUMBER 3**

An Exclusive Service for Harrison's Mississippi Code 1972 Annotated Subscribers.

Because of the inconvenience, at times, of working with several volumes of the annotated code, The Harrison Company saw the need to provide a practical and quick access to the statutory law. The result is the Subscriber's Unannotated Service Desk Book.

This service is not for sale. The Harrison Company has prepared this desk book for the exclusive use of its subscribers, and it may only be obtained as a complimentary service resulting from the purchase from The Harrison Company of a set of the Mississippi Code 1972 Annotated.

This convenient one volume desk book contains the statutory material found in all volumes of the Mississippi Code 1972 Annotated.

NEW FLEXIBLE BINDER MAKES THIS DESK BOOK AS EASY TO USE AS YOUR TELEPHONE DIRECTORY!

Specifications
3¼" × 9½" × 10¼"
Brown simulated leather
vinyl and gold foil stamped

Dial (404) 522-7242, Our 24 Hour Customer Service Desk

THE HARRISON COMPANY, PUBLISHERS

178 - 180 Pryor Street • Atlanta, Georgia 30303

Call us any time . . . for services rendered by Mississippi's largest Trust Department. We at Deposit Guaranty National Bank welcome the opportunity to work with attorneys in serving the needs of their individual and industrial clients. Services are offered in matters involving trusts, wills, estates, pension programs and retirement plans. Call us at any time . . . we look forward to hearing from you.

TRUST DEPARTMENT
DEPOSIT GUARANTY NATIONAL BANK
GROW WITH US/JACKSON, MISS./MEMBER F.D.I.C.

Teamwork. Mid-South Title's National Department works hand-in-hand with Mississippi attorneys in real estate title matters—an important reason we lead the league in the Mid-South. Sole agent for Commerce Title Guaranty Co.

MID-SOUTH TITLE COMPANY
12 South Main Street Memphis, Tennessee 38103
W. J. "Bill" Gallagher, Vice Pres. 901/523-8121

MST

The MISSISSIPPI LAW JOURNAL is published by University of Mississippi law students seven times annually in January, April, June, July, September, November, and December. Editorial and business offices: Mississippi Law Journal, P.O. Box 146, University, Mississippi 38677.

Current subscription: $12.00 per year. Single issue, $3.00. Bar Directory, $2.50. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Members of the Mississippi State Bar send address changes to the Mississippi State Bar, P.O. Box 1032, Jackson, Mississippi 39205. All other subscribers send address changes directly to the Mississippi Law Journal. Include name, new address (including zip code) and old address. Please notify 45 days in advance to ensure prompt delivery.

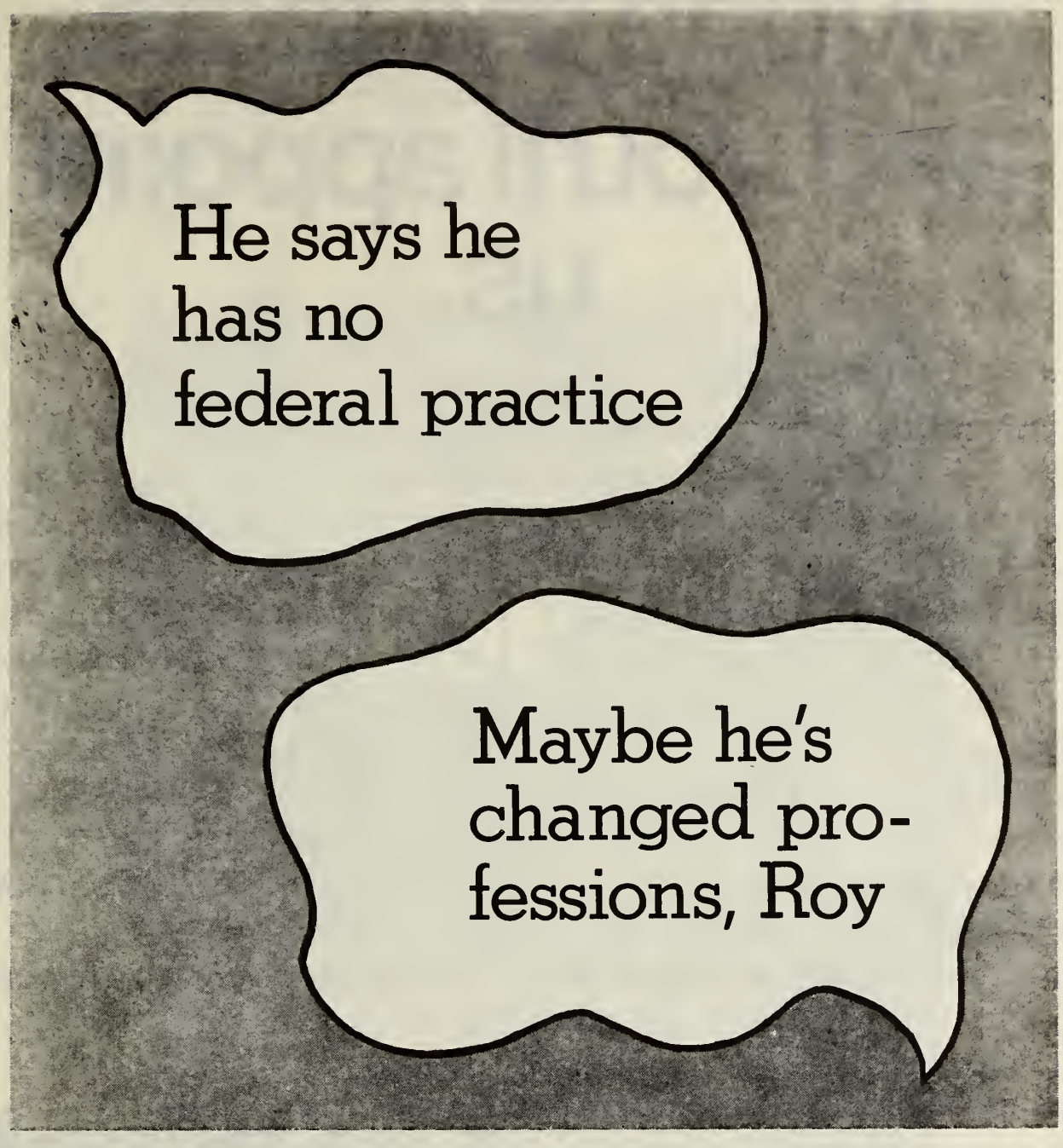
Unless a claim is made for nonreceipt of Journal issues within 6 months after the mailing date, the Mississippi Law Journal cannot be held responsible for supplying those issues without charge.

Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to *A Uniform System of Citation* (11 ed. 1967), copyright by the Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Journal.

The Mississippi Law Journal is a member of the National Conference of Law Reviews.

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.



There is no way the citizen, whatever he pursues, can escape the spreading influence of federal law. It is a 1973 daily fact of life.

To adequately represent his citizen clients, today's lawyer must have federal law readily at hand. Many thousands of successful lawyers rely heavily on United States Code Annotated to bring them the federal statutes that affect their clients, together with all court decisions that construe them.

USCA can be a working tool for you, helping to build your practice. See your West representative or write us for facts.

WEST PUBLISHING COMPANY

Frank R. Martin
P.O. Box 1781, Jackson Mississippi 39205
Phone 601/362-2096

Judge the facts, and you'll appoint us.

Nobody needs to tell you the importance of weighing all the facts in order to make a sound decision. Especially when that decision is where to invest money.

So consider, if you will, these facts:

We've got the investment alternative that's nothing short of custom-fitted to your investment need. For the short-term, it's our Daily Interest account. Like the name says, you earn interest, *paid daily,* from date of deposit to date of withdrawal. Just like clockwork. Great for your own idle funds or for money soon to be transferred.

For estate or court-controlled funds, one of our Unifirst Certificates of Deposit* will do a particularly good job. You get a high rate of return, without a high risk.

But here's the clincher. DialAccount. The telephone transfer service that lets you withdraw money from your checking account and deposit it in your Unifirst Daily Interest account, just by calling us. Think of the times you had money to invest, but didn't have the time to do it. Now you do, thanks to Unifirst's DialAccount.

Judge the facts. You'll want to appoint us as your place to invest.

It's an open-and-shut case.

Unifirst®

Unifirst Federal Savings and Loan Association

Accounts now insured to $40,000 by the FSLIC, an agency of the United States.

*A substantial interest penalty is required for early withdrawal.

Printing Cost Up 6-10%

If your printing costs are eating away your budget then ask Darby Printing Company about our revolutionary new
ESP*
system. If you are presently our customer, you can get a one year extension of your contract using ESP* at no price increase. If you are a new customer, you can get a price reduction on our 1974 prices using ESP*. It doesn't cost anything to look and might save you some big money.
*electronic scanning preparation

DARBY PRINTING COMPANY
715 W. WHITEHALL ST., S.W.
ATLANTA, GEORGIA 30310
TELEPHONE (404) 755-4521

Handwriting Expert

GILBERT J. FORTIER, JR.

Examiner of Questioned Documents

Since 1946

Scientific identification of questioned handwriting, handprinting, typewriting, ink, paper, alterations, erasures, obliterations, etc. Complete laboratory equipment consisting of specially adapted cameras, lenses, microscopes, measuring devices, chemicals, ultra-violet and infra-red apparatus, paper and ink testing devices, and all other necessary scientific instruments. Qualified witness in Federal and State Courts, civil and criminal, regarding documentary disputes. Photographic exhibits prepared for court demonstration. Portable equipment for examining and photographing filed and impounded documents at any location.

3024 DE SOTO ST. — PH. (504) 482-8160
NEW ORLEANS, LA. 70119

OUR OFFICES KEEP GETTING BIGGER BECAUSE OUR SERVICE KEEPS GETTING BETTER.

Over the years our growth has been the direct result of one thing. Service. At MVT we stay on top of things with modern data processing equipment, a team of skilled professionals and a will to be the best.

That's why Mississippi lawyers all across the state count on us for quick, accurate service. We'd like to hear from you, too.

Mississippi Valley Title Insurance Company

Home Office: Jackson, Mississippi 315 Tombigbee P. O. Box 2428
Branch offices in Birmingham, Little Rock, Memphis, Mobile and Atlanta
Offices or agents in Miss., Ark., La., Ala., Fla., N.C., S.C., Tenn., and Ga.

Larry Hendricks, Manager

At Chicago Title, we always remember... your reputation is as important as ours. That's why we deliver the best.

As professionals working for professionals—we understand the constant need to enhance our good reputations.

That's why we never ask you to accept anything but the best from us.

It's as straight as that.

Chicago Title Insurance Company

Capitol Towers Building, Congress and Pearl Streets, Suite 100
P.O. Drawer 22552, Jackson, Mississippi 39205 · Phone 601/969-0313

Mississippi Law Journal

**JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW**

VOLUME 46 SUMMER 1975 NUMBER 3

Copyright © 1975, Mississippi Law Journal

TABLE OF CONTENTS

ARTICLES

THE MISSISSIPPI BUSINESS CORPORATION ACT: DOES THE MISSISSIPPI VERSION LIME THE BUSHES? ..... *E. Clifton Hodge, Jr. and Alan W. Perry* 371

EMPLOYER SPEECH DURING UNION ORGANIZATIONAL CAMPAIGNS ..... *Charles Claiborne Barksdale* 401

COMMENTS

MORTGAGES TO SECURE FUTURE ADVANCES: PROBLEMS OF PRIORITY AND THE DOCTRINE OF ECONOMIC NECESSITY 433

AN ANALYSIS OF MISSISSIPPI'S COOLING-OFF LEGISLATION 461

CONTROL OR CARTE BLANCHE? MISSISSIPPI LICENSES CHIROPRACTIC 483

RECENT DECISIONS

TORTS—STRICT LIABILITY IN TORT FOR THE BUILDER-VENDOR FOR PROPERTY DAMAGE CAUSED BY STRUCTURAL DEFECTS (*Oliver v. City Builders, Inc.*, Miss. 1974) 510

LABOR LAW—EMPLOYER'S DUTY TO BARGAIN ON THE BASIS OF AUTHORIZATION CARDS—UNION HAS THE BURDEN OF SEEKING AN NLRB ELECTION (*Linden Lumber Division, Summer & Co. v. NLRB*, U.S. 1974) 520

CORPORATIONS—STATE REGULATION OF FOREIGN CORPORATIONS—PURCHASE OF COTTON WITHIN STATE BY FOREIGN CORPORATION FOR INTERSTATE SALE CONSTITUTES INTERSTATE COMMERCE (*Allenberg Cotton Co. v. Pittman*, U.S. 1974) 530

CONSTITUTIONAL LAW—JUROR SELECTION—EQUAL PROTECTION DENIED WHEN MASTER GRAND JURY LIST SIGNIFICANTLY UNDERREPRESENTS DEFENDANT'S RACE (*Ford v. Hollowell*, N.D. Miss. 1974) 539

BOOK REVIEWS

CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES ..... *Aaron S. Condon* 549

THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS ..... *Stephen Gorove* 553

THE LAW IN AMERICA: A HISTORY ..... *Michael de L. Landon* 555

MISSISSIPPI LAW JOURNAL BACK ISSUES — CUMULATIVE INDEXES

Back Issues for Volumes 1-46	$3.00
New Index for Volumes 31-40	6.00
Index for Volumes 21-30	3.00
Index for Volumes 1-20	3.00
Complete Set of Above Indexes	10.00

Send order to:

MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 46 SUMMER 1975 NUMBER 3

MISSISSIPPI STATE BAR

1974-75

OFFICERS

James Hugh Ray of Tupelo	President
Frank D. Montague, Jr. of Hattiesburg	President-Elect
L. F. Sams, Jr. of Tupelo	Second Vice-President
George van Zant of Jackson	Executive Director and Secretary-Treasurer

COMMISSIONERS

Fred M. Bush, Jr.	Tupelo	Elzy J. Smith	Clarksdale
Norman Breland	Gulfport	Joe A. Thompson	Hattiesburg
Ottis B. Crocker, Jr.	Bruce	Aleita M. Sullivan	Mendenhall
Howard Dyer, Jr.	Greenville	John Gordon Roach, Jr.	McComb
John E. Shaw	Kosciusko	Jack A. Morris	Monticello
John T. Green	Natchez	Dewitt T. Hicks, Jr.	Columbus
Sam Wilkins	Jackson	Ronald L. Taylor	Southaven
Morris Phillips, Jr.	Carthage	Lunsford Casey	Laurel
Gerald Braddock	Vicksburg	Charles R. McRae	Pascagoula
Walter Eppes, Jr.	Meridian	James H. Herring	Canton

MEMBERS OF THE LAW JOURNAL-LAW SCHOOL LIAISON COMMITTEE

Hugh N. Clayton, *Chairman*
New Albany

Will A. Hickman, *Vice-Chairman*
Oxford

Lowell E. Grisham
Oxford

Lester F. Sumners
New Albany

W. W. Eppes, Jr.
Meridian

L. F. Sams, Jr.
Tupelo

Claude Clayton, Jr.
Tupelo

Frank J. Hammond, Jr.
Moss Point

Phineas Stevens
Jackson

Frank Thackston
Greenville

Joel P. Walker
Hernando

THE MODEL BUSINESS CORPORATION ACT: DOES THE MISSISSIPPI VERSION LIME THE BUSHES?

E. Clifton Hodge, Jr. and Alan W. Perry***

For [they] . . .
Have all lim'd bushes to betray thy wings,
And, fly thou how thou canst, they'll tangle thee:
William Shakespeare, King Henry VI, Part II

Even the most severe critic must admit that the 1962 Mississippi Business Corporation Act[1] was a great improvement over the hodge-podge of corporate statutes which that Act superseded. By patterning the complete revision of the Mississippi statutes on the then-current version of the Model Business Corporation Act, rather than attempting a hit-and-miss revision of the existing statutes, the legislature brought forth a serviceable and comprehensive corporate code. However, problem areas, such as ambiguities, inconsistent provisions, and illogical restrictions on corporate activity have limed the bushes for Mississippi corporate practitioners so that the snares are avoided only by cautious compliance with the statute, sheer luck, and prayer.

While we doubt not the efficacy of any of the three, we are reminded of the story attributed to Gladstone:[2]

> There was once a little girl who really believed in prayer. When her brother made a trap to catch little sparrows, she prayed for three days that it might fail.
>
> Her faith was so absolute that her mother asked her one morning, "Julia, why are you so sure your prayer will be answered?"
>
> Julia smiled. "I know that my prayer will be answered," she said, "because I went out three days ago and kicked the trap to pieces."

In this spirit, we hope in this article to provide suggestions to the practitioner as to how the traps may best be avoided as well as recommendations concerning legislative dismantlement of them.

The Model Act was first published in 1946 by the Corporation Law Committee of the American Bar Association (now the Committee on Corporate Laws of the Section of Corporation, Banking and Business

---

* Assistant Professor of Law, University of Mississippi. B.B.A. 1964; J.D. 1967, University of Mississippi; L.L.M. 1970, Harvard.

** Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Mississippi. B.B.A. 1969, University of Mississippi; J.D. 1972, Harvard.

[1] MISS. CODE ANN. §§ 79-3-3 to -293 (1972), *as amended,* (Supp. 1974).

[2] J. BRAUDE, LIFETIME SPEAKERS ENCYCLOPEDIA 623 (1962).

Law).[3] Revisions were published in 1950, 1953, 1959 and 1969, with 1950 being regarded as the point when the Model Act basically assumed its present form.[4] The Committee stated: "[t]he primary purpose of the Model Act is to provide state commissions and bar association committees with a working model for revision and modernization of their corporate laws."[5] According to a spokesman for the authors of the Model Act, the draftsmen attempted to preserve sound provisions contained in the corporate statutes of most states prior to publication of the Model Act, while discarding some of the obsolete provisions of then-existing laws.

> The Committee submits the Model Act as a modern state act that preserves in proper balance the interests of the state and the rights and interests of corporations, shareholders and management. It may not appeal to a state that is soliciting corporate business, but it will be attractive to any state that seeks to provide a sound and modern law under which its business corporations in general can be organized and continue to exist. Uniformity of corporation laws among the states would be of inestimable value to business and our profession. The Committee believes the Model Act is worthy of uniform adoption.[6]

The Model Act has been criticized as being protective of management at the expense of creditors and shareholders,[7] but its substantial "adoption" in at least 28 states[8] indicates that any such deficiencies are deemed relatively unimportant. Probably one reason the Model Act has been adopted in so many states is that it is well organized and easy to comprehend. For example, it has been favorably compared to the Delaware Corporate Act, which, of course, is the most important corporate legislation in the United States because of the number of large corporations incorporated in Delaware.[9]

The initial draft of the Model Act was based upon the Illinois Business Corporation Act of 1933.[10] This is not surprising since the commit-

---

[3] Eisenberg, *The Model Business Corporation Act and the Model Business Corporation Act Annotated*, 29 BUS. LAW. 1407 (1974); *see* Emerson, *The Roles of Management and Shareholders in Corporate Government*, 23 LAW & CONTEMP. PROB. 231 (1958). For an excellent discussion of the rationalization for "permissive" corporate statutes, see Folk, *Some Reflections of a Corporation Law Draftsman*, 42 CONN. B.J. 409 (1968).

[4] Eisenberg, *supra* note 3, at 1407-08.

[5] Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. 1, 2 (1950).

[6] *Id.* at 7.

[7] *See, e.g.*, Harrison, *The Model Business Corporation Act — Invitation to Irresponsibility?*, 50 NW. U.L. REV. 1 (1950).

[8] *See* 1 MODEL BUS. CORP. ACT ANN. § 1, ¶ 2, at 4 (2d ed. 1971).

[9] Katz, *The Philosophy of Midcentury Corporation Statutes*, 23 LAW & CONTEMP. PROB. 177, 188 (1958).

[10] Garrett, *Model Business Corporation Act*, 4 BAYLOR L. REV. 405, 424 (1952).

tee which prepared the Model Act was primarily composed of the authors of the Illinois Act.[11] Subsequent revisions of the Model Act reflect an enlargement of the Committee which is the Act's caretaker.[12] The method of preparing and revising the Model Act has been criticized because of the lack of a defined objective, lack of information on differences of opinions among Committee members, and the failure to circulate draft provisions among relevant sections of the legal profession.[13]

The Mississippi Act was initiated and primarily sponsored by a subcommittee of the Committee on Corporations, Banks, Banking and Business Law of the Mississippi State Bar Association.[14] It is clear that this subcommittee never intended to adopt the entire Model Act without modifications. This Committee stated in its 1961 report:

> The conclusion has been reached that the "Model Business Corporation Act" probably furnishes the best basis for a new corporation act for Mississippi; but the use thereof would require extensive study to correlate that which we have with the new and to avoid possible harm to existing jurisprudence on the subject in Mississippi.[15]

Evidently, the main reason for adopting the Model Act was the availability of extensive explanations and interpretations of the various provisions of the Model Act.[16]

The differences between the Model Act and the Mississippi Act result from one or a combination of the following: (1) Provisions in the Model Act as it existed at the time of the enactment of the Mississippi Act (1962) were changed or deleted in the course of legislative enactment; (2) provisions were added to the Model Act in the enactment of the Mississippi Act; and (3) revisions made in the Model Act since 1962 have not been made in the Mississippi Act.

A discussion of all differences between the Model Act and the Mississippi Act is beyond the scope of this article. Only the most significant differences will be discussed, and even with regard to the significant differences the discussion will be somewhat limited in order to keep it manageable. For example, one of the subjects covered in the article is indemnification of corporate officers and directors. This subject alone could easily justify a lengthy article. Consequently, there is no attempt to state all the ramifications of the statutory differences in every area

---

[11] *Id.*

[12] *Id.*

[13] *See* Eisenberg, *supra* note 3, at 1410.

[14] *Proceedings of the Fifty-Sixth Annual Meeting of the Mississippi State Bar*, 32 Miss. L.J. 339, app. A, at 405 (1961).

[15] *Id.*

[16] *See Proceedings of the Fifty-Seventh Annual Meeting of the Mississippi State Bar*, 33 Miss. L.J. 407, app. A, at 457 (1962).

covered, nor is there an attempt to give exhaustive citations of authority on each point covered. The objective is to explain the major differences, to state the authors' opinion of the primary practical effects of those differences, and to make recommendations concerning any needed legislative modifications.

The authors admit at the outset a bias in favor of the current version of the Model Act. This bias is basically a result of the following factors: (1) A belief that statutory uniformity of corporate laws is useful; (2) general confidence in the methodology used in promulgating the Model Act and its revisions; (3) our experience which indicates that problems in the practice of corporate law in Mississippi are found primarily in three areas where the Mississippi Act differs from the Model Act; and (4) our opinion that, since the Mississippi Act was based upon the Model Act, revisions to the Model Act correcting deficiencies which previously existed provide the best source for updating the Mississippi Act.

The recommendations for changes in the Mississippi Act are generally limited to provisions derived from the Model Act. The authors recognize that there are many well-drafted statutes other than the Model Act which might be used as sources for changes in the Mississippi Act. The authors, however, believe that it would be unwise to start a process of revising the Mississippi Act from a number of different sources, since the confusion which results from such a process usually outweighs the merits of deviation from the pattern of following the Model Act.

While any corporate code must reconcile the competing interests of common stockholders, senior security holders, and management,[17] corporate statutes have in many instances provided significantly less protection to certain of these interests than was apparently contemplated by the drafters. At the same time, however, the statutes have often placed substantial and unnecessary restrictions on corporate freedom in achieving legitimate corporate objectives which are beneficial, or at least benign, to all three groups. Accordingly, each statutory provision designed to afford protection to one class or the other must be carefully scrutinized to determine whether it does in fact afford the protection intended, whether that protection is necessary, and whether it unduly restricts reasonable corporate objectives. This type of analysis is ultimately a function of judgment. Every draftsman and commentator has his own ideas as to the "objective fairness" of any transaction (for example, a "freeze-out" of minority shareholders or distributions of capital surplus) depending on his own perception of the factual circumstances

---

[17] *See* Folk, *supra* note 3, at 410.

under which the transaction is most likely to occur and on his evaluation of the relative equities and valid expectations of the parties in conflict. Thus, we have felt free to express our own opinions in this article without apology.

In our analysis of the Mississippi Act, we have divided provisions of the Mississippi Act which vary from the latest draft of the Model Act into four general categories: First, provisions designed primarily to protect the creditor; second, provisions designed primarily for the protection of shareholders, particularly minority shareholders; third, provisions designed primarily for the regulation of a corporation's transactions with its own corporate officers and directors; and fourth, provisions dealing with the protection of officers and directors. These divisions are not hard and fast; often provisions have been designed, or are perceived to have been designed, for the protection of more than one class. Nevertheless, we believe that this type of categorization may be helpful in tracing and evaluating the main threads of the Mississippi Act.

I. Protection of Senior Security Holders

A. Capital and Capital Surplus

Historically, corporate statutes have been designed to protect senior security holders[18] by ensuring that there are funds available to meet their claims. This historic objective—carried out through various devices—has been viewed as a quid pro quo for the basic corporate principle of limited stockholder liability.[19] As an offset to recourse against the individuals conducting an enterprise, legislatures have undertaken to assure that the corporation maintains adequate funds to satisfy the claims of its creditors.

As a practical matter, sophisticated senior security holders—particularly holders of formalized debt instruments—are likely to secure adequate protection in the investment contract, which can be as specific as necessary to protect the security holder. On the other hand, trade creditors and short-term lenders are much less likely to obtain such contractual protection and, as a result, rely primarily on the protections afforded by the corporate statute.

The protection afforded by the statute, however, is often illogical. For example, the current Mississippi statute requires only that the sum

---

[18] The phrase "senior security holders" as used in this article refers to all of those parties whose claims against the assets of the corporation rank higher in priority than the claims of the common stockholders. As thus defined, the phrase includes not only holders of preferred stock or formalized debt instruments but also general creditors.

[19] *See* 2 Model Bus. Corp. Act Ann. § 51, ¶ 4, at 187 (1st ed. 1960).

of one thousand dollars be contributed as a prerequisite to beginning business as a corporation.[20] In light of the almost minimal protection afforded by this provision, we have considered whether to recommend that the Mississippi statute be amended to accord with the latest revision of the Model Act, which dispenses altogether with the minimal capital provision.[21] We have concluded, however, that in view of the almost negligible inconvenience that this provision entails to even the smallest business conducted in corporate form, the provision may have the laudable effect of slightly discouraging the ill-considered and casually undertaken corporate venture by pointing out to the interested parties that choosing the corporate form over the partnership or proprietorship necessarily entails some compliance with legal restrictions.

The primary mechanism for ensuring the existence of corporate funds to meet the claims of creditors has been the common statutory requirement limiting "ordinary" distributions to the common stockholders to those from earned "surplus" (variously defined) or by similar limitations.[22] The statutory mechanism's weakness lies in the fact that the corporate statutes at their best preserve only that capital which was originally contributed, and are not seriously intended to ensure that an adequate amount was contributed *ab initio*. Moreover, few, if any, statutes require the contribution of additional capital to replace that lost in the operations of the enterprise.

A judicially created mechanism used to accomplish the same general objective is the doctrine which, eschewing a definite test as to the amount of capital which must be devoted to the corporate enterprise, requires a post hoc analysis as to the initial adequacy of the capital contribution. This judicial mechanism—"piercing the corporate veil" by imposing personal liability on the stockholders, or subordinating the debt owed to stockholders to that owed to the general creditors—has been effective only in the most flagrant cases of undercapitalization, since the required flexibility of the rule necessarily creates a vague liability which the courts have understandably been reluctant to apply except in those rare instances when it is obvious that the potential liability should have been perceived by the investors.[23] Moreover, the judicial mechanism—like the statutory mechanism—is not designed to require that capital depleted by unsuccessful operations be replaced.

Perhaps as a result of a perceived weakness in the Model Act provi-

---

[20] MISS. CODE ANN. § 79-3-111 (1972).

[21] *See* 2 MODEL BUS. CORP. ACT ANN. § 56, ¶ 2, at 206 (2d ed. 1971).

[22] *See generally* Hackney, *The Financial Provisions of the Model Business Corporation Act*, 70 HARV. L. REV. 1357 (1957).

[23] For a general discussion of this many-faceted doctrine, see W. CARY, CASES AND MATERIALS ON CORPORATIONS 113 (4th ed. unabr. 1969).

sions limiting distributions to stockholders, the Mississippi Legislature created an extra restriction which is unique to the Mississippi Act—section 79-3-87. Briefly stated, section 79-3-87 provides that, notwithstanding any other provisions to the contrary, a corporation shall not pay cash dividends except out of unreserved and unrestricted earned surplus. This section follows section 79-3-85, a Model Act provision which expressly authorizes payment of cash and property dividends out of capital surplus. The clear import of section 79-3-87 is to negate the general authorization of section 79-3-85 that distributions from capital surplus may be made to the stockholders unless the corporation is insolvent or unless certain other restrictions are applicable. It is puzzling why this restriction was thought necessary, since prior Mississippi law apparently limited the prohibition to capital stock ("capital" in the terminology of the Model Act).[24]

Quite obviously, *any* proscription of distributions to common stockholders preserves assets which may ultimately be used to repay creditors and other holders of senior securities; on the other hand, the proscription of *all* distributions to common stockholders in order to preserve the ability of the enterprise to ultimately repay senior capital would impose a prohibitive cost on common stock ownership. Thus, the senior securities must be deprived of protection to some extent, rather than be afforded complete protection. The question is how to strike the balance.[25]

It is our opinion that section 79-3-87 creates too much interference with normal and economically useful corporate objectives, while affording creditors only minimal protection. At the outset, we note that section 79-3-87 affords only marginal protection since the Model Act restricts distributions from capital surplus if the corporation is insolvent or if rights of preferred stockholders would be prejudiced. Thus, even under the Model Act short-term creditors have clear statutory protection against distributions which would render the corporation unable to satisfy its debts.

There is no overriding reason why creditors are entitled to insist that any portion of capital surplus (or even capital, except the $1,000.00 minimum) be maintained except when necessary to maintain corporate solvency. While it is true that in theory trade creditors may have relied on the existence of corporate assets in excess of that required to liquidate corporate debts—an extra margin over that required to be maintained by the Model Act—most of the trade creditors will have their debts satisfied in a relatively short time and, thus, should be adequately pro-

---

[24] *See* Adams v. Delta & Pine Land Co., 89 Miss. 817, 42 So. 170 (1906); Miss. Rev. Code ch. 35, art. 33 (1857) (repealed 1962).

[25] V. Brudney & M. Chirelstein, Corporate Finance and Financial Management pt. II, 215-16, 1971 (unpublished work in the possession of the authors).

tected by the Model Act provisions prohibiting distributions that would render the corporation insolvent. Moreover, as a practical matter it is extremely unlikely that a trade creditor would actually be so sophisticated as to distinguish between capital surplus, on one hand, and unrestricted earned surplus on the other.

Creditors whose debts are to be liquidated over a longer time period—where it is possible that events after a legal distribution would impair the ability of the corporation to repay the debt to the creditor—should not be entitled to rely indefinitely on the maintenance of excess assets even if representing capital surplus. Our premise allows the long-term creditor to protect himself at his option, but allows distributions from capital surplus where there are in fact no creditors relying on such surplus.

Section 79-3-87, however, appears to adopt the premise that all contributed capital and capital surplus is devoted permanently to corporate uses except on complete liquidation. Note also that section 79-3-87 (if applied to distributions of assets other than cash, such as securities) would effectively prohibit divisive reorganizations conducted through the mechanism of section 79-3-85.

In spite of the clear prohibition in section 79-3-87 of distributions in the form of dividends from capital surplus, that section does not prohibit all distributions from capital surplus. Thus, the proposition of section 79-3-87—"once in, never out, except on final dissolution"—is not mirrored in the rest of the Mississippi Act. Indeed, the objective of declaring a cash dividend from capital surplus can be accomplished through the expedient of a pro rata redemption of stock. Section 79-3-9 specifically authorizes the acquisition of a corporation's own stock out of capital surplus if permitted by the articles of incorporation or by two-thirds vote of the stockholders. While the Internal Revenue Code would treat such a transaction as a dividend to the extent of earnings and profits,[26] it is unlikely that this complex and intricate area of the federal tax law could be transplanted without explicit authorization into the state corporate statute characterizing the transaction as a dividend subject to section 79-3-87. It should be observed that section 79-3-9 also affords a mechanism to conduct a divisive reorganization by merely redeeming a part of the outstanding stock in return for stock of the new corporation.

The inconsistency between sections 79-3-9 and 79-3-87 demonstrates the irrationality of requiring that all corporate funds except earnings be frozen in corporate solution. There are numerous good and valid reasons to distribute major portions of the assets on occasions other than complete liquidation, just as there are valid reasons for divisive reorgan-

---

[26] *See* INT. REV. CODE OF 1954, § 302(d).

izations. If section 79-3-87 could not be so easily avoided by use of section 79-3-9, it would be a serious problem. As it is, it is a mere anomaly.

At this point we note a rather obvious technical problem in the language of section 79-3-87. While restricting "cash dividends," no mention is made of distributions of property. Since section 79-3-85 authorizes distributions of cash *or property* from capital surplus in some circumstances, query whether the property distributions are permitted under the Mississippi Act. Perhaps a court would hold that the draftsmen intended cash as a shorthand notation to refer to all dividends other than stock dividends. At any rate, if property dividends are permitted, then section 79-3-87 could easily be avoided by purchasing property to be distributed in lieu of cash.

In sum, it is our conclusion that section 79-3-87 provides little if any protection to creditors. In addition, by requiring that a corporation resort to a pro rata stock redemption in order to conduct a partial liquidation (or to conduct a "split-off" or "split-up" rather than a "spin-off"),[27] the statute unnecessarily complicates a valid corporate objective. Moreover, because section 79-3-87 is a significant deviation from the Model Act, it could become a stumbling block for counsel inexperienced in Mississippi corporate practice.

B. Par Value

Notwithstanding the fact that the concept of par has probably outlived its usefulness, it still permeates all state corporate statutes with regard to the amount of consideration which must be paid for stock.[28] Originally, the function of par was twofold: (1) To provide capital for the protection of creditors and (2) to protect the shareholders *inter se* by requiring that each shareholder pay the same amount of consideration for shares issued.[29] The advent of no-par and nominal-par stock virtually ended the protection afforded by the par concept to creditors, and it is now clear that the par concept does not require that stock be issued to shareholders for equal consideration.[30]

---

[27] Spin-offs, split-ups, and split-offs are economically equivalent methods of accomplishing divisive corporate reorganizations. In a spin-off, a corporation distributes the stock of a subsidiary to its stockholders. A split-off is identical, except that the stockholders surrender part of their stock in the parent in exchange for the stock of the subsidary. In a split-up, the parent corporation distributes its stock in two or more subsidiaries in complete liquidation. *See* B. Bittker & L. Stone, Federal Income Estate and Gift Taxation 736 (4th ed. 1972). While the end result of these methods is usually identical, the Mississippi Act affords the spin-off a disfavored status.

[28] *See* W. Cary, *supra* note 23, at 1106.

[29] *See id.*

[30] *See id.* at 1107; Herwitz, *Allocation of Stock between Services and Capital in the Organization of a Close Corporation*, 75 Harv. L. Rev. 1098, 1112 (1962).

Section 18 of the Model Act provides that par stock may be issued for consideration not less than par value and that no-par stock may be issued for such consideration as may be fixed by the board of directors. Section 79-3-33 of the Mississippi Act is identical to section 18 of the Model Act, except that it provides that par stock must have a par value of at least $1.00 per share and no-par stock must be issued for a consideration of at least $1.00 per share. The issue for discussion is, therefore, whether the requirement under the Mississippi Act of a $1.00 per share minimum on par and no-par stock is useful.

It should be noted at the outset that it is probably a misnomer to classify stock as no-par when there is a statutory requirement that at least $1.00 per share be paid. Nevertheless, the discussion will assume that there is still enough difference under the Mississippi Act between par and no-par stock to justify maintaining the different classifications.

The probable reason for including the $1.00 minimum in the Mississippi Act was to prevent the issuance of "penny stock" which was believed to be inherently misleading to the public. We believe that if this proposition has merit it should be applied to publicly distributed stock through the Mississippi Securities Law[31] rather than indiscriminately applied to all corporations through the Business Corporation Act.

While the par concept has probably outlived its usefulness, it can still cause problems in the areas of "watered" stock and the computation of stated capital.[32] As noted above, section 18 of the Model Act and section 79-3-33 of the Mississippi Act provide that par stock may be issued for consideration not less than par value, thus implying that such stock could not be lawfully issued for less than par value. When stock is issued for less than the required consideration, it is "watered,"[33] and in most states the shareholder may be liable under some circumstances to the corporation or its creditors for the amount of the "water."[34] Section 79-3-47 of the Mississippi Act, which is identical to section 25 of the Model Act, provides:

> A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

Under the Mississippi Act, "full consideration" would be at least par value for par stock and $1.00 per share for no-par stock. In view of

---

[31] MISS. CODE ANN. §§ 75-71-1 to -57 (1972), *as amended*, (Supp. 1974).

[32] Israels, *Problems of Par and No-Par Shares: A Reappraisal,* 47 COLUM. L. REV. 1279, 1280 (1947).

[33] *See* 11 W. FLETCHER, PRIVATE CORPORATIONS § 5199 (rev. vol. M. Wolf ed. 1971).

[34] *See id.*

the foregoing, the effect of Mississippi's $1.00 per share minimum consideration is that if a shareholder pays less than $1.00 per share (whether par or no-par) he has not paid the required consideration, and there is a probability that he will be liable to the corporation and its creditors for the deficiency.[35]

The consideration for no-par stock is usually determined by the board of directors when the issuance of the stock is authorized. If the board of directors fails to specify the amount of consideration, there is a troublesome question in most states of whether there is a statutory minimum for the issuance of no-par stock.[36] In Mississippi the question is answered by the $1.00 minimum.

The result is that a purchaser of no-par stock from a Mississippi corporation would probably be liable to the corporation or its creditors if less than $1.00 per share were paid, while a purchaser of no-par stock from a non-Mississippi corporation under the same conditions could argue that there is no minimum legal consideration and that there can therefore be no watered-stock liability. The prudent practitioner can easily avoid this problem by ensuring that the consideration paid for stock issued by a Mississippi corporation equals or exceeds par or stated value *and* is at least $1.00 per share. Since the effect of the provision can be so easily avoided, it serves mainly as a pitfall for the uncautious stock purchaser.

Moreover the $1.00 minimum is a significant problem to the corporation which desires to issue additional shares when the market value of its stock is below $1.00 per share. Since a corporation cannot usually issue shares at a price above market value of outstanding shares, the corporation will have to modify its capital structure in order to avoid violating the $1.00 minimum. Among the techniques that a corporation could use are a reverse stock split, a recapitalization, or a downstream merger. Any of these could result in an increase of the per share market value, thus allowing the issuance of additional shares without violating the $1.00 minimum. The corporation which is particularly vulnerable to this problem is the one which initially issues its stock at or slightly above $1.00 and then loses money in its operations. Consequently, it would be advisable for a corporation which foresees the possibility of an additional stock issuance to set its initial per share price at an amount sufficiently in excess of $1.00 to absorb any anticipated losses.[37]

---

[35] Automatic liability for this deficiency is based upon the "statutory obligation" theory. An alternative theory for liability is the "misrepresentation" theory which requires a court to view the issue of watered stock as a misrepresentation of the corporation's capital. *See* Bing Crosby Minute Maid Corp. v. Eaton, 46 Cal. 2d 484, 297 P.2d 5 (1956).

[36] *See* W. CARY, *supra* note 23, at 1107-09.

[37] It is submitted that it is reasonable for many corporations to anticipate losses during their early years of operation.

We believe that the Mississippi Act's $1.00 minimum is not desirable primarily because of the above-described problems. Thus existing law requires that a financially troubled corporation desiring to obtain additional capital through the issuance of stock go through a possibly expensive reorganization simply to create a situation where the stock could be issued for at least $1.00 per share. A downstream merger or recapitalization would require a vote of the shareholders,[38] and the expense and delay of proxy solicitation for such a vote might prevent obtaining the needed capital and precipitate the financial ruin of the corporation. Because of these problems created by the $1.00 minimum, and because we believe that it affords no effective protection to creditors or shareholders,[39] we believe the $1.00 minimum should be removed from the Mississippi Act.

II. PROTECTION OF SHAREHOLDERS

A. Shareholder Approval of Fundamental Changes

If any generalization can be drawn, the Mississippi Act (which follows generally the 1959 version of the Model Act as to the points discussed) provides substantially more protection to minority shareholders than do later versions of the Model Act. One clear example is the repeated requirement of the Mississippi Act for approval by holders of two-thirds of all stock entitled to vote on a number of issues, such as amendments to the articles of incorporation,[40] sale of assets other than in the ordinary course of business,[41] merger,[42] and dissolution.[43] These actions are those which have been viewed as changing the fundamental course or direction of the corporation business, and have historically required greater-than-normal margins of approval by the shareholders.[44]

The 1969 version of the Model Act, in comparison, takes the position that a mere majority is necessary to approve such fundamental corporate changes.[45] Moreover, the Model Act has the effect, if not the

---

[38] MISS. CODE ANN. §§ 79-3-117, -145 (1972).

[39] See part I *A supra*.

[40] MISS. CODE ANN. § 79-3-117 (1972).

[41] *Id.* § 79-3-157.

[42] *Id.* § 79-3-145.

[43] *Id.* § 79-3-167.

[44] N. LATTIN, LAW OF CORPORATIONS §§ 155-59 (2d ed. 1971).

[45] Of course even under the Model Act traditional equitable concepts will apply. The power of the majority is not absolute, although the limitations on that power are not clearly defined.

In Pepper v. Litton, 308 U.S. 295, 306 (1939), the Supreme Court stated:

> A director is a fiduciary. . . . So is a dominant or controlling stockholder or group of stockholders. . . . Their powers are powers in trust. . . . Their deal-

purpose, of permitting public corporations to take necessary corporate action even when greater-than-majority votes may be difficult to obtain because of lack of stockholder participation in corporate decision making. This is no small point since, as more Mississippi corporations become publicly owned, quorum problems will undoubtedly increase.[46] For instance, the authors know of at least one publicly held corporation which was unable to hold an annual meeting at all for lack of a quorum. We are also familiar with instances where publicly held corporations have been unable to act on apparently noncontroversial issues requiring greater-than-majority approval because of lack of adequate stockholder participation.

In the authors' opinion, it is doubtful whether there should be many, if any, greater-than-majority requirements in the corporate statute. No longer should there be any actual reliance, in light of current experience, by a stockholder of a publicly held corporation that the corporation will continue in its present business or mode of doing business. Stockholders of close corporations, on the other hand, can and should protect themselves through shareholder agreements rather than relying on the uncertain and ill-adapted protection of the corporate statutes.

Assuming, however, that there are certain corporate actions which should require greater-than-majority approval, then what affirmative vote should be required?

To the end of compromising the important interests of minority shareholders with the no-less-important interest of stockholders as a whole in assuring that the business of the corporation go forward as expeditiously as possible, we suggest the following modified procedure.

> ings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.

Compare the following statement of the standard:

> Corporations must be allowed to function under majority control, as do most institutions in this country, so long as the majority does no actual wrong to the minority or to others. Courts are not to be called on to operate or control them except in cases wherein such interference is essential to justice; and in interfering with what majority has done in such a case as this, real caution must be taken not to work a wrong in striving towards the right.

Landstreet v. Meyer, 201 Miss. 826, 835, 29 So. 2d 653, 656 (1947).

[46] Proxy solicitation for a publicly owned corporation can be expensive, and this expense is a problem to a corporation with limited financial resources.

Quorum problems are particularly acute for companies whose shares are held in small blocks by a number of casual investors. There are, of course, a number of such companies in Mississippi.

On those matters which are deemed to be of such importance that they require greater-than-normal majority approval, the Act should require passage by a vote of a majority of all shares entitled to vote *and* a two-thirds vote of all shares actually voting. This two-step requirement would serve the purpose of allowing minority opposition to block proposed corporate action if it can muster at least one-third of the votes actually participating in the process; it would correct the procedure now in use, which automatically counts apathetic or nonparticipating stockholders as in opposition to the proposed corporate action. We submit that such apathetic or nonparticipating stockholders are more likely to be in favor of the proposed action, since those in opposition would probably take the time and the trouble to at least send in a proxy.[47]

We also suggest that Mississippi might well follow the lead of the latest versions of the Model Act which dispense with the requirement of shareholder approval of a mortgage or pledge of substantially all of the property or assets of the corporation.[48] While that portion of section 79-3-157 pertaining to sale, lease, or exchange might be retained under the theory that stockholders are entitled to vote on such a fundamental change of corporate direction, there is no purpose in extending such a requirement to a mere mortgage or pledge. If a corporation is entitled to borrow money without shareholder approval, then it should be entitled to mortgage or pledge the assets of the corporation as security for payment of that debt. In effect, borrowing money in the corporate name subjects all of the assets of the corporation to the debt; the only purpose of the mortgage or pledge is to secure to the lender a preference or priority in the event that the corporation does not satisfy that debt. That preference or priority is over other creditors, not over the stockholders. Thus, the basic decision to subject the corporate assets to the debt is made as a result of the loan, not as a result of the mortgage or pledge.

The problem with requiring shareholder approval of a mortgage or pledge is that quite often it would require a special stockholders' meeting with no corresponding benefits to the stockholders. The expense and delay caused by the requirement of such a meeting in the case of a closely held corporation is minimal; in the case of a publicly held corpo-

---

[47] The formula outlined above might be modified if the corporation has adopted a provision in its articles of incorporation allowing one-third of the shares entitled to vote to constitute a quorum. In that case, the proposed action should require approval by at least one-third of all shares entitled to vote, and two-thirds of those shares actually participating in the process. However, a convincing argument can be made that such fundamental changes in corporate direction should require at least majority participation.

[48] The terms "mortgage" and "pledge" have been eliminated from section 79 of the Model Act.

ration which must comply with SEC proxy requirements, the expense and delay could be substantial. Moreover, it is the authors' experience that lenders quite often extend credit on ordinary resolutions of the board of directors authorizing the corporate officers of the corporation to borrow money, without satisfying themselves that stockholder approval of the mortgage or pledge has been secured. Thus, this provision might well constitute another pitfall for the corporation's (and lender's) attorney.

B. Stock Rights and Options

Section 79-3-37 of the Mississippi Act, generally based on section 20 of the Model Act, authorizes a corporation to issue options to purchase its shares or other securities. There are, however, substantial differences between the Model Act and the Mississippi Act with regard to the issuance of such options to directors, officers, or employees of the corporation. Under the Model Act, options issued to directors, officers, or employees "and not to the shareholders generally" must be approved by a majority of the shares outstanding. Under the Mississippi Act, such options must be approved by three-fourths of the shares outstanding *even if the options are issued to shareholders generally.*

In enacting the Mississippi Act, the majority-share-approval requirement of the Model Act was changed to three-fourths approval, and the words "and not to the shareholders generally" were eliminated. These deviations place a substantial burden on the corporation with widely held stock, because not only is it difficult (if not impossible) for such a corporation to get three-fourths of the shares voted on *anything,* but also such a vote is required even where all shareholders receive options. To illustrate, assume that a corporation with 2,000 shareholders desires to make a rights offering to its existing shareholders whereby each shareholder has the right to purchase a number of additional shares based upon the number of shares owned. Obviously, some of the directors, officers, or employees will be among those receiving the options. This rights offering would not require shareholder approval under the Model Act since it is made to "shareholders generally." Under the Mississippi Act, however, the rights offering would require approval from the holders of three-fourths of the shares outstanding. To obtain such approval, the corporation might have to call a special meeting and engage in an expensive proxy solicitation only to discover that without inordinate effort three-fourths of the shares would never be represented at any meeting, special or annual.

Stock options are frequently used as additional compensation and incentive to directors, officers, and employees of corporations with widely held stock. The unjustifiably restrictive provisions of the

Mississippi Act make such use of stock options practically impossible in many instances. A corporation could easily decide to incorporate in a state other than Mississippi solely because of this provision.

It is submitted that there is no reason for the deviations from the Model Act with regard to options to directors, officers, or employees. The Mississippi Act should include the words "and not to the shareholders generally" and require only a majority rather than three-fourths vote in situations where the options are not offered to shareholders generally.

III. Regulation of Corporate Transactions with Corporate Officers and Directors

A. Director Conflicts of Interest

Section 41 of the Model Act provides that a contract or transaction between a corporation and one or more of its directors will not be void or voidable if approved by a majority of the disinterested directors or by the shareholders or if the contract or transaction is fair and reasonable to the corporation. The purpose of the provision is stated in the official comment as follows:

> Its purpose is to establish statutory guidelines for determining the validity of transactions between a corporation and one or more of its directors, or between corporations having common directors, or between a corporation and another entity in which a director of the corporation is financially interested. It validates, if the prescribed tests are satisfied, transactions with interested directors which common law rules often made voidable, if not void.
>
> . . . .
>
> The function of section 41 is not to provide a basis for validating for all purposes a contract or transaction between an interested director and his corporation, but simply to establish that such contract or transaction is not automatically void or voidable solely by reason of the director's interest.[49]

Mississippi has no statute comparable to section 41, and the status of such contracts in Mississippi seems to be controlled by the decision of the Mississippi Supreme Court in *Knox Glass Bottle Co. v. Underwood*.[50] In that case, the Mississippi court was faced with the

---

[49] 2 Model Bus. Corp. Act Ann. § 41, ¶ 2, at 842, 844 (2d ed. 1971).

[50] 228 Miss. 699, 89 So. 2d 799 (1956). Miss. Const. art. 7, § 194 provides in part:

> No person who is engaged or interested in a competing business, either individually or as an employee or stockholder, shall serve on any board of directors of any corporation without the consent of a majority in interest of the stockholders thereof.

propriety of profits derived by corporate officers and directors from truck leases to the corporation. The court decided that the corporation could recover some of these payments, and in support of the decision made the following statements:

> Where this conflict [between a director and his corporation] exists, and where there is no full disclosure and ratification by or estoppel of the corporation and its stockholders, equity requires the fiduciary to account for the profits, *regardless of the good faith of the defendant fiduciaries, and regardless of whether the corporation suffered any actual injury.* Even if the ground for rescission was unfairness or bad faith, and in either circumstance, the burden of proof is on the director or officer to show its inherent fairness to the corporation.
>
> . . . .
>
> The important factor in the present case is that the interested fiduciaries have acted for and represented both the corporation and themselves in making these lease contracts. When that occurs, it is well established that, in the absence of ratification or estoppel, and full disclosure, the transaction is voidable at the option of the corporation, without proof of actual fraud or of actual injury to the corporation.[51]

While the language of *Knox Glass* sweeps broadly in its declaration of absolute voidability, a careful reading of the case indicates that its scope is more limited than first reading would indicate.[52] At the outset, we note that in *Knox Glass* the interested directors "represented both the corporation on one side and themselves on the other." The general rule of most jurisdictions prior to the promulgation of the Model Act would have made such a contract voidable at the option of the corporation,[53] and thus the Mississippi court's holding is not surprising, although apparently the weight of more current authority would look to the fairness of the transaction even in the circumstances of *Knox Glass*.[54]

The court's opinion indicated, however, that the rule enunciated there—voidability unless ratification or estoppel can be proven, without

---

This constitutionally mandated prohibition is incorporated as part of MISS. CODE ANN. § 79-3-67 (1972). However, this prohibition has not been of great importance judging from the lack of reported decisions.

[51] 228 Miss. at 741, 743, 89 So. 2d at 813, 815. (emphasis added).

[52] The court stated that the doctrine of corporate opportunity did not apply, although the factual basis for that determination was not discussed. While the facts in *Knox Glass* apparently would have supported the application of the doctrine of corporate opportunity, there may have been other facts indicating that the corporation had actually rejected the opportunity. In any event, the court's opinion illustrates that the leases were unfair to the corporation. Thus, the court could have reached its result by relying upon unfairness and avoided the enunciation of such an absolute rule of voidability.

[53] 3 W. FLETCHER, PRIVATE CORPORATIONS § 924, at 387-89 (rev. vol. M. Wolf ed. 1965).

[54] 1 G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 439, at 542 (1959).

regard to fairness—is limited to the situation where the interested party represents both the corporation and himself. Where the corporation is represented in its dealings by persons independent of the contracting directors, the contracts are voidable *unless* the interested director can carry the burden of establishing good faith and fairness.

The Model Act and the Mississippi rule under *Knox Glass* differ in that the Model Act clearly saves a contract from automatic voidability through application of one of two standards: ratification by a majority of the disinterested members of the board of directors or proof of the fairness and reasonableness of the contract. Under the Mississippi rule, however, it is unclear what effect, if any, ratification by the disinterested directors would have.[55] Moreover, under the Mississippi rule even fairness would not save a contract where the contracting director had represented the corporation. Ratification by the shareholders would prevent voidability under either the Model Act or *Knox Glass* tests.

Thus in *Knox Glass* the Mississippi court drew a distinction, not of degree, but of type based on whether the contracting director "represented the corporation." However, does it really make a difference whether or not the director participated as the corporation's representative in making the contract or voted as a director to approve the contract? Prior to 1880 it is clear that it made no difference, since the general rule would have made the contract voidable in either event.[56] One rationale for the rule was that the corporation was entitled to the unprejudiced judgment of all directors.[57] Another more convincing justification was that it was impossible to measure the influence that one director might have over his colleagues even though he might have refrained from participation in the discussion under vote. In any event, in earlier days courts were disinclined to let the validity of contracts turn on proof as to who negotiated with whom for whom; instead, the courts adopted a broad rule making all corporate contracts with directors voidable.[58]

By 1960, however, the tide of judicial opinion had definitely shifted, and in the words of one commentator:

---

[55] One commentator has said that as early as 1910

> the general rule was that a contract between a director and his corporation was valid if it was approved by a disinterested majority of his fellow directors and was not found to be unfair or fraudulent by the court if challenged . . . .

Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality,* 22 BUS. LAW. 35, 39-40 (1966).

Presumably Mississippi would follow the general rule, especially in light of the current trend of emphasis on fairness and disclosure.

[56] *Id.* at 36.

[57] *Id.* at 37.

[58] *Id.*

> [I]t could be said with some assurance that the general rule was that no transaction of a corporation with any or all of its directors was automatically voidable at the suit of a shareholder, whether there was a disinterested majority of the board or not; but that the courts would review such a contract and subject it to rigid and careful scrutiny, and would invalidate the contract if it was found to be unfair to the corporation.[59]

Thus, modern jurisprudence has moved away from the traditional trust-derived learning which made voidable all transactions between the corporation and one of its directors and has moved toward a standard of fairness and disclosure, whether or not the contracting director participated in the corporate decision-making process.

It is submitted that section 41 of the Model Act provides a better guideline than the existing law of Mississippi, especially in view of the prevalence of small- and medium-sized corporations necessarily doing business with entities controlled by one or more of their directors. Since the Model Act clearly allows ratification by a majority of the disinterested directors, it permits a publicly held corporation to validate its contracts without the expense and delay of a special stockholders' meeting. While we recognize the protection afforded by a prophylactic rule as to corporate officers representing and dealing with a corporation, we believe that sufficient protection is afforded by placing the burden of proof as to fairness on the director or officer. In *Knox Glass* the transactions were obviously unfair, and the court clearly reached the correct decision. In other circumstances, however, the rule could become a sword rather than a shield. In sum, it is our opinion that a strict interpretation of *Knox Glass* does not coincide with commercial practices or practicalities in Mississippi, and its strict application would invalidate numerous existing contractual arrangements which are fair to all involved.

As pointed out in the official comment to section 41, the only result under section 41 is that the contract is not automatically voidable or void. The Model Act provision does not affect a corporation's ability to recover from a director who has abused his position by self-dealing, although approval by the directors or stockholders may shift the burden of proof as to unfairness from the interested directors to the corporation.[60]

In Mississippi, the only absolutely safe way to protect against the voidability of a contract with an interested director is by shareholder ratification, and where there are numerous shareholders the expense of

---

[59] *Id.* at 43.

[60] *Cf.* 30 Mo. L. Rev. 628, 630 (1965).

obtaining such ratification could easily outweigh any protection afforded the corporation and its shareholders. If the contract has been approved by the disinterested directors or shareholders, it should not be *automatically* voidable; if it is fair and reasonable, it should not be voidable at all.

B. Loans to Officers and Directors

Section 79-3-89 of the Mississippi Act tracks the 1959 version of the Model Act[61] by absolutely prohibiting loans from a corporation to its officers or directors, as well as loans secured by the corporation's own shares. This provision recognizes the inherent need for protection of creditors in such situations. Loans to officers or directors could have the substantive effect, so far as creditors are concerned, of distributing assets of the corporation in exchange for claims of dubious value, while a default on a loan secured by the corporation's stock has the net effect of a distribution of corporate assets in redemption of corporate stock. Moreover, the statutory prohibition recognizes that a corporate loan to an officer or director (just as any other transaction between a corporation and one of its officers or directors) can be the occasion for self dealing and abuse. For example, the loan may be a disguised non pro rata dividend, or the existence of an unrecorded loan may be asserted as a defense to an embezzlement charge.

The primary enforcement provision specifically enunciated in the Mississippi Act is that portion of section 79-3-91 which provides that all directors who assent to such loans are jointly and severally liable for repayment of the loan. Not only does this provide the corporation and its creditors additional (and possibly solvent) defendants to pursue in the event of default on the loan, but it should also have the effect of discouraging prohibited loans if the directors are aware of their potential liability. In addition to the statutory protection, presumably an action would lie to enjoin such illegal activity and to require the corporation to collect any outstanding loans.[62]

There is, however, at least one valid reason for allowing a wholly owned or closely held corporation to make a loan to an officer or director. A bona fide loan (and subsequent repayment) has no tax effect on the lender or debtor, while a dividend (and subsequent reinvestment) has a substantial tax effect—the dividend is treated as ordinary income to the recipient.[63] Thus, the existing statute has the effect of exposing even temporary use of excessive corporate funds by a stockholder-director to

---

[61] ABA-ALI MODEL BUS. CORP. ACT § 42 (1959).

[62] *See generally* Werner, *Stockholder Withdrawals—Loans or Dividends?*, 10 TAX L. REV. 569 (1955).

[63] INT. REV. CODE OF 1954, § 301.

the risk of adverse tax treatment. It is the authors' experience that attempts to avoid taxable dividends, coupled with ignorance of statutory restrictions on the part of directors, occasion widespread disregard of the current statutory prohibition, at least in closely held corporations. We believe that some modification of the existing provision is necessary to recognize the desirability of allowing the holder of all of the outstanding stock to borrow from his corporation so long as creditors are not prejudiced.

Section 47 of the 1969 version of the Model Act relaxes to a degree the prohibitions of earlier versions by (a) allowing loans to any director if authorized by the stockholders, and (b) allowing loans to any employee, including an employee who is also a director, even in the absence of such stockholder ratification. In the employee situation the Model Act provides the additional restriction that the board of directors must find that the loan serves corporate purposes.

We believe that this latest provision of the Model Act goes too far. While the ratification procedure provides protection to shareholders in some situations, the deficiencies of the section are obvious. Majority shareholder-directors may divert corporate assets to themselves over the objections of the minority, and need not even submit the question to a stockholder vote (or even disclose the issue) if the majority shareholder-directors happen to be employees.

Further, the corporate purpose restriction of the new Model Act is vague at best and affords little protection. Indeed, the authors confess some difficulty in enunciating a standard of application for this statutory requirement which would allow loans to directors in any substantial number of cases without destroying the efficacy of the language as a meaningful protection to shareholders and creditors.

We submit that the appropriate starting place for formulation of a rule in this area is by accepting the inherently unprovable (but no-doubt practical) premise that corporate loans to stockholders or directors are rarely made for corporate purposes. Rather, such loans are made by-and-large for the benefit of the recipient of the loan. While what is good for the recipient director *may* be what is good for the corporation, that usually is only incidental to the main purpose of benefiting the recipient.

Based on this premise, we suggest that the appropriate standards to govern such loans are suggested by the existing statutory provisions dealing with distributions to stockholders. While loans are by definition only temporary distributions, they often are used as devices to mask the permanent withdrawal of funds from the corporation. Even if not intended to become permanent withdrawals, they sometimes have such an effect.

In deriving standards based on this premise we note at the outset

that loans to directors constitute a peculiar type of distribution—a non pro rata distribution. Just as all stockholders would be entitled to share in an ordinary dividend distribution,[64] we submit that they should be entitled to share equally in the benefits of borrowing excess corporate funds. Thus, we propose that loans to directors should be unanimously approved by all stockholders. This in practical effect limits such loans to wholly owned or closely held corporations, where the argument for allowing such loans is the strongest. Under such a provision the possibility of majority stockholder-directors taking advantage of minority stockholders would be substantially reduced.

For the purpose of providing protection to creditors, we suggest that loans to officers or directors should be made only out of surplus to the extent that a distribution to stockholders would be allowed.[65] Such a provision would afford the creditor all of the protection to which he is entitled, since the creditor is not affected by the manner in which funds are withdrawn from the corporation—whether by loan or by distribution. The creditor is only concerned with the amount of funds remaining to meet his claim. Such a provision would allow a creditor ample protection without subjecting a borrower to the risk of dividend treatment for tax purposes. Of course, surplus would be restricted to the extent of the loan until the loan is repaid, thus preventing additional loans or dividends which would impair the rights of creditors.

As to corporate loans secured by shares of a corporation's stock (whether or not such loans are made to officers or directors), we submit that such transactions should be treated as contingent repurchases of a corporation's own stock. That is, such loans should be made only to the extent that a corporation could repurchase its own shares under section 79-3-9, and surplus should be restricted until the loan is repaid. While it could be argued that such a provision would merely encourage resort to unsecured loans as an alternative to the security of a corporation's own stock, we submit that such an alternative would be desirable in that it would clearly disclose what is already a fact—so far as a corporation's creditors are concerned, a debt to the corporation secured by the corporation's own stock is really unsecured.

In sum, we recommend that loans to officers or directors, and loans secured by the corporation's own stock, be regulated for corporate law purposes as distributions of corporate assets to (or with the consent of) the stockholders. While such distributions may be temporary, they should be treated as any other distribution until they are repaid.

---

[64] 11 W. FLETCHER, PRIVATE CORPORATIONS § 5352 (rev. vol. M. Wolf ed. 1971).

[65] *See id.* and accompanying text *supra*.

IV. Protection of Officers and Directors

A. Indemnification

Because of the increasing liability to which corporate directors and officers are exposed, the indemnification of such officers and directors for expenses incurred in litigation relating to their corporate positions is one of the most widely discussed and controversial areas of comment in the corporate law field.

When the Mississippi Act was adopted in 1962, the only provision of the Model Act pertaining to indemnification of officers and directors was section 4(o). This indemnification provision was included in the Mississippi Act[66] without any material change. The 1969 version of the Model Act contains an indemnification provision which is substantially different from the original Model Act provision.[67] The question, therefore, is whether the reasons for changing the Model Act are sufficient to support a change in the Mississippi Act.

Under the Mississippi Act, a corporation has the power in certain circumstances to indemnify its officers and directors against expenses of litigation in which the officer or director is a party because of his corporate office. The overall problem with this section of the Mississippi Act is that it does not provide sufficient statutory guidance for this complex area. It simply leaves too many questions unanswered. The current version of the Model Act is not so much a change in the philosophy of indemnification as it is an elaboration of the statutory standards. We shall discuss separately the various questions which have arisen in the area.

(1) *Persons covered.* The Mississippi Act covers corporate directors and officers (past and present) and persons requested to serve as directors or officers of a subsidiary or debtor corporation. The Model Act, in addition to those covered under the Mississippi Act, covers employees and agents of the corporation. The additions in the Model Act are desirable, since there appears to be no reason to exclude employees and agents who are not officers or directors from the coverage.

(2) *Amount of Indemnification.* The Mississippi Act covers "expenses actually and reasonably incurred" with no distinction between third party actions and shareholder derivative actions. Under the Model Act, the amount of indemnification depends upon whether the litigation is a third party action or a derivative action. Under subsection (a) of the Model Act provision, which deals with third party suits, the corporation has authority to indemnify against "expenses (including attorneys'

---

[66] Miss. Code Ann. § 79-3-7(o) (1972).

[67] ABA-ALI Model Bus. Corp. Act § 5 (1969).

fees), judgments, fines and amounts paid in settlement actually and reasonably incurred." Subsection (b) of the Model Act provision allows a corporation in a derivative suit to indemnify a director[68] against "expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action."

It is not clear that the word "expenses" under the Mississippi Act includes attorneys' fees, and it is probable that it does not include judgments paid in third party suits, while the Model Act explicitly covers these two items. Attorneys' fees are likely to be the largest expense incurred by a director in such litigation, and the Mississippi Act would therefore be cold comfort to a director if it were interpreted as not covering attorneys' fees. The specific reference to attorneys' fees in the Model Act is an example of how interpretation problems may be legislatively avoided through the use of a more elaborate provision on indemnification. Assuming that the implicit philosophy of the indemnification provisions was initially correct, it should be implemented where needed, and the specific reference to attorneys' fees seems to be a correct implementation. For the same reasons, indemnification against judgments in third party suits should be authorized by the Mississippi Act.

The Mississippi Act does not specifically refer to amounts paid in settlement of litigation against directors. If the Mississippi Act does not allow indemnification against amounts paid in satisfaction of judgments, then it should not allow amounts paid in settlement. The Model Act specifically allows indemnification against amounts paid in settlement of third party actions, and this seems to be a correct extension of the provision allowing indemnification against judgments paid in third party actions. The only apparent disadvantage for allowing indemnification of settlements in third party suits is that it allows the director to avoid adjudication of negligence by the court, and as will be discussed later, this might affect the right to indemnification. Subsection (d), however, contains safeguards against abuse of settlement indemnification. These safeguards, plus the general desirability of settlement over litigation, make the specific allowance of settlement indemnification preferable to the probable exclusion of such allowance under the Mississippi Act.

(3) *Duty to indemnify.* There is no *duty* under the Mississippi Act for a corporation to indemnify—there is only a limited *power*. Under subsection (c) of the Model Act provision, the corporation has a duty to indemnify a director against expenses (including attorneys' fees) when such director has successfully defended an action relating to his corpo-

---

[68] The term "director" as used in this discussion includes all persons described in section 5 of the Model Act.

rate position. While we assume that most corporations would indemnify in such situations, it is our opinion that the director should have an express right to indemnification.

(4) *Limitations on Indemnification.* The Mississippi Act does not allow indemnification when the director has been *adjudged* liable "for negligence or misconduct in the performance of duty." Also it does not allow indemnification when the director is adjudged liable for a violation of Mississippi's antitrust[69] and fair trade[70] statutes. The exclusions were added to the Model Act provision as it existed when the Mississippi Act was passed in 1962. There is no apparent reason why liability under these two statutes is any different from other statutory liability to which a corporate officer might be subjected. For example, with regard to indemnification, how is director liability under the Mississippi Securities Law[71] any different from liability under the antitrust and fair trade law statutes? The indemnification against liability under the antitrust and fair trade statutes can be adequately covered under the general indemnification provisions, and the specific reference to these statutes should be removed.

Under the Model Act, the main limitation on indemnification is that the director must have

> acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful.[72]

Obviously, the Model Act is not as limited as the Mississippi Act. Under the Model Act, a corporation could indemnify a director even if he were adjudged negligent or in violation of a duty if he acted in good faith and not against the best interests of the corporation. This aspect of the Model Act would be objectionable if it were not for the limitations in subsection (d). The determination whether the director has met the standards of that subsection must be made by one of the following: (1) A disinterested majority of board of directors; (2) independent legal counsel; or (3) the shareholders. Admittedly, a determination by any of these three might be questionable for various reasons,[73] but the lack of

---

[69] MISS. CODE ANN. §§ 75-21-1 to -39 (1972).

[70] *Id.* §§ 75-23-1 to -53.

[71] *Id.* §§ 75-71-1 to -57, *as amended,* (Supp. 1974).

[72] ABA-ALI MODEL BUS. CORP. ACT § 5(a) (1969).

[73] *See* Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Officers and Directors,* 77 YALE L.J. 1078 (1968); Klink, Chalif, Bishop & Arsht, *Liabilities Which Can Be Covered Under State Statutes and Corporate By-Laws,* 27 BUS. LAW. 109, 121 (1968).

reasonable alternatives makes this solution acceptable. Ideally, a court would decide in each situation whether the director has met the standard, but such a procedure is impractical. There have been suggestions that if the determination is made by a disinterested board of directors or independent legal counsel, the shareholders should receive notification of the action.[74] We agree, and recommend that requirement be added to the Model Act and the Mississippi Act.

As pointed out above, the Mississippi Act excepts from indemnification cases where a director is adjudged negligent in the performance of a duty. Recent expansion of directors' duties makes this limitation more important than it was in 1962 when the Mississippi Act was adopted. Although the limitation of the Mississippi Act can often be circumvented through a properly worded provision in the articles of incorporation or bylaws,[75] the Model Act limitations on indemnification are more reasonable than those in the Mississippi Act. It is submitted that flagrant violations of directors' duties will not be indemnified because of the safeguards of subsection (d) of the Model Act. Also, it should be remembered that in shareholder derivative suits the indemnification would not cover amounts paid in judgments and settlements.

(5) *Exclusivity of Statutory Provisions.* The Mississippi Act contains the following provision:

> and to make any other indemnification that shall be authorized by the articles of incorporation or by any bylaw or resolution adopted by the stockholders after notice.[76]

This provision seems to mean that, notwithstanding the above described limitations on indemnification of the Mississippi Act, a corporation may make indemnification in *any* situation authorized by the articles of incorporation, bylaws, or stockholders' resolution. If this is a correct interpretation, the limitations on indemnification are very easy to circumvent, and the statute is merely a trap for the unwary.

Unfortunately, the Model Act in subsection (f) continues the policy of allowing corporations to ignore the statutory limitations on indemnification through the use of provisions in the bylaws and articles of incorporation.[77] This loophole might be justified in the vague indemnification provision of the Mississippi Act, but it is not justified in the detailed

---

[74] *Cf.* Cheek, *Control of Corporate Indemnification: A Proposed Statute,* 22 VAND. L. REV. 255, 288 (1969).

[75] See part IV(5) *infra.*

[76] MISS. CODE ANN. § 79-3-7(o) (1972).

[77] For example, does this provision allow the corporation to indemnify a director for judgment in actions brought against him by the corporation through a derivative action? If it does, the suit is meaningless except to the plaintiff's attorney.

provision of the Model Act. At least one commentator has concluded that subsection (f) of the Model Act adds nothing, and in fact, may be a hinderance to the interpretation of the Model Act.[78] Subsection (f) should be removed from the Model Act.

(6) *Advancement of Expenses.* The Mississippi Act has no specific provision allowing a corporation to advance funds to a director to pay expenses being incurred by the director. On the other hand, section 5(e) of the Model Act (1969 version) allows a corporation to pay expenses before final disposition of the action if the director agrees to repay the corporation in the event it is ultimately determined that the director was not entitled to indemnification. This Model Act provision is reasonable. Litigation can be lengthy, and periodic payment on expenses such as attorneys' fees might be necessary. Without advances, the director might unnecessarily encounter financial problems. While the director may be unable to repay the advances if he is ultimately ineligible for indemnification, this ability to pay argument cuts both ways because the corporation may be financially unable to indemnify a director even if he is entitled to indemnification as a matter of right.

(7) *Insurance.* Section 5(g) of the current Model Act authorizes a corporation to purchase insurance covering liability of a director growing out of his status as a corporate official, even if the corporation would not have the power to indemnify against such liability. The Mississippi Act makes no reference to such insurance, but it can be assumed that it would allow the corporation to purchase insurance for liability which qualifies for indemnification. However, it is probable that insurance to cover liability not qualifying for indemnification under the Mississippi Act would be in violation of public policy and invalid.[79]

The Model Act's specific reference to insurance is desirable, but the authorization of insurance beyond statutory indemnification is questionable. If corporations are allowed to expand indemnification by use of bylaw provisions, then they should be allowed to provide insurance against such expanded coverage. However, if corporations are limited to statutory indemnification as suggested, then insurance should be similarly limited.

In summary, the Model Act provision on indemnification is definitely better than the provision in the Mississippi Act. The weaknesses in the Model Act are failure to require notice of indemnification to shareholders, authorization of deviations from statutory indemnification by use of bylaw provisions, and allowance of insurance for liability which exceeds that allowed by statutory indemnification. The Missis-

---

[78] Cheek, *supra* note 74, at 276-78.

[79] *Cf.* Klink, Chalif, Bishop & Arsht, *supra* note 73, at 124.

sippi Act should be amended to adopt the indemnification of the Model Act with minor changes to correct the aforementioned deficiencies of the Model Act.

B. Payment of Expenses in a Shareholder's Derivative Suit

Section 49 of the Model Act authorizes a court to require the plaintiff in a shareholder's derivative suit to pay the expenses, including attorneys' fees, of the defendant if the court finds that the suit was filed "without reasonable cause." This section also authorizes the defendant to require a bond from the plaintiff to cover such expenses if the plaintiff owns less than 5 percent of the outstanding shares and the market value of shares held by the plaintiff is less than $25,000. The Mississippi Act contains no similar provisions. Section 49 of the Model Act further provides that a shareholder in a derivative action must have owned stock in the corporation at the time of the transaction of which he complains or that he must have received stock by operation of law from one who held stock at such time. Section 79-3-93 of the Mississippi Act contains the same stock ownership requirement.

In view of the differences between the Model Act and the Mississippi Act, the question is whether it would be advisable for Mississippi to adopt the aforementioned Model Act provisions relating to payment of the defendant's expenses by the plaintiff.

The provision in the Model Act requiring security for expenses was obtained from a similar New York statute.[80] New York, the first state to enact a statute providing for such security for expenses, passed the legislation in 1944 to discourage unmeritorious claims ("strike suits") against corporate officers and directors.[81] The authorization of the court to require the plaintiff to pay the defendant's expenses originated with the Model Act.[82] The demand for such legislation surfaced after a number of "strike" suits occurred in the 1930's.[83]

The authors are aware of no situation under Mississippi law where the court can require the plaintiff to pay the defendant's attorneys' fees.[84] In fact, there are relatively few situations in Mississippi practice where a successful plaintiff can recover attorneys' fees from the defendant.[85] Therefore, if Mississippi were to adopt the Model Act provisions

---

[80] 2 MODEL BUS. CORP. ACT ANN. § 49, ¶ 2, at 33 (2d ed. 1971).

[81] Note, *Security for Expenses in Shareholders' Derivative Suits: 23 Years Experience,* 4 COLUM. J. LAW & SOCIAL PROB. 50 (1968).

[82] 2 MODEL BUS. CORP. ACT ANN. § 49, ¶ 2, at 33 (2d ed. 1971).

[83] Note, *supra* note 81, at 51-52.

[84] Domestic relations cases and matters involving a counterclaim technically might be exceptions to this statement.

[85] The rule in this state is that, in the absence of statute, attorney's fees are not

for payment of expenses, there would be a significant departure from past practices. Does the threat of unmeritorious shareholder derivative actions justify such a departure? It is submitted that it does not.

It is probable that the provisions of the Model Act would significantly diminish the possibility of an oppressed minority shareholder litigating his case by using a derivative action.[86] A quick glance at the Mississippi Digest and annotations to the Mississippi Act will show that there have been very few shareholders' derivative suits in Mississippi. The "strike" suits which brought about provisions like those in the Model Act simply have not been a problem in Mississippi. Of course, without the Model Act provisions, the potential for abuse exists. But it is submitted that a mere potential for such abuse is not sufficient to justify the enactment of the Model Act provisions authorizing assessment of attorneys' fees against the plaintiff and giving the defendant the right, in some cases, to demand security for the payment of attorneys' fees. As noted earlier, section 5(b) of the Model Act provides for indemnification by the corporation against expenses, including attorneys' fees, incurred by a director in the successful defense of a shareholder's derivative suit.[87] This means the expense of an unmeritorious derivative suit ultimately falls on the shareholders of the corporation, causing the policy issue to be whether the shareholders as a group are more likely to be harmed or assisted by a security-for-expense statute. The resolution of this issue depends on the situation and is a matter of judgment. The authors believe that in Mississippi at the present time a security-for-expense statute would harm more than assist shareholders as a group. Unless an abuse of shareholder derivative suits develops in Mississippi, we believe the Model Act provisions covering expenses in such suits are unnecessary.

Conclusion

There have been no significant changes in the Mississippi Business Corporation Act for 13 years. Perhaps this is attributable to the belief of the Legislature and Bar that the 1962 revision constituted a complete,

---

recoverable, unless the facts are of such gross or willful wrong as to justify the infliction of punitive damages.

Cooper v. United States Fidelity & Guar. Co., 186 Miss. 116, 122, 188 So. 6, 7 (1939); *accord*, Home Tel. Co. v. Darley, 355 F. Supp. 992, 1001-02 (N.D. Miss. 1973), *aff'd per curiam*, 489 F.2d 1403 (5th Cir. 1974); Dedeaux v. Dauro, 275 So. 2d 863, 864 (Miss. 1973); Equity Servs. Co. v. Hamilton, 257 So. 2d 201, 207 (Miss. 1972); City of Laurel v. Bush, 238 Miss. 718, 729-30, 120 So. 2d 149, 155 (1960); Wilborn v. Balfour, 218 Miss. 791, 806, 67 So. 2d 857, 864 (1953); State *ex rel.* Brooks v. Wynn, 213 Miss. 306, 311, 56 So. 2d 824, 826 (1952); Ouzts v. Carroll, 190 Miss. 217, 224, 199 So. 76, 78 (1940).

[86] *But cf.* Note, *supra* note 81, at 50.

[87] See part IV *A supra*.

lasting, and satisfactory solution to the problems which existed under prior law. However, as this article has noted, substantial deficiencies remain. While this article is not intended to be a blueprint for a complete revision of the corporate statutes, it is our hope that it will not only give notice of some of the problem areas in the corporate statutes but will also stimulate further discussion and analysis of how these problem areas may be eliminated or avoided.

EMPLOYER SPEECH DURING UNION ORGANIZATIONAL CAMPAIGNS

*Charles Claiborne Barksdale**

Employers faced with union organizational activity too frequently assume that anything can be said in order to defeat the union. Their attorneys, on the other hand, too frequently assume that nothing can be said and so stifle any activity by the employer that no effective presentation of the employer's position is made.

A medium does exist, and employers may in certain ways state their position to the employees. Such statements are restricted. Within the restrictions, however, exists a fairly broad area of permissible speech. In advising an employer of those expressions which have been sanctioned by the National Labor Relations Board and the courts, the attorney must be aware of the very specific rules governing employer speech and must understand the general framework under which these rules are applied.

I. Background

A. The Wagner Act and Employer Rights

The rise of American labor unions was an arduous one. Labeled at first "criminal conspiracy,"[1] unionization slowly became accepted as a legal means by which employees could band together when they considered it to be in their common interest. For a period after being recognized, however, unions had relatively little effect since the courts held unlawful a great number of union activities.[2] Once again the courts expanded their attitude toward acceptable ends and means and, realizing that the restrictions upon union activity effected sterilization rather than prophylaxis, lessened the restraint considerably.[3]

---

*B.A. 1971, J.D. 1974, University of Mississippi. Associate, Jolly, Holloman & Miller, Jackson, Mississippi.

[1] *See, e.g.*, Commonwealth v. Pullis (Philadelphia Cordwainers), (Philadelphia Mayor's Ct. 1806), 3 Documentary History of American Industrial Society 59 (2d ed. 1910), *analyzed in* Nelles, *The First American Labor Case*, 41 Yale L.J. 165 (1931).

[2] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (interference with ongoing business and contractual relations); Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911) ("peaceful persuasion"); Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929) (strikes); Barry v. Donovan, 188 Mass. 353, 74 N.E. 603 (1905) ("combinations in restraint of trade"); Vegelahn v. Gunter, 167 Mass. 92, 44 N.E. 1077 (1896) (intentional infliction of economic harm).

[3] *See, e.g.*, American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184

Thus, by the time the National Labor Relations Act,[4] or the Wagner Act, was adopted in 1935, labor unions and their goals were generally accepted by the courts and Congress. Their right of existence, then, was governmentally ensured. But the right to exist and existence itself are two different things. The courts might allow the activity, but affirmative help was not yet available. The right to organize and bargain was there, but no safeguards against coercive conduct by employers existed. For example, employees could organize, but an employer could fire any organizer it desired. Thus, the presence of unions was tenuous and their impact relatively minor.

The Wagner Act afforded the affirmative aid that unions required. Section 7 declared the rights of employees,[5] and section 8 protected them by prohibiting employer domination or interference with labor organizations, employment discrimination designed to discourage or encourage membership in unions, discharge of an employee for filing charges against the employer for unfair labor practices, and refusal to bargain with the union. The essence of the section states:

> § 8. (a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

The National Labor Relations Board was created to administer the Act. The development of the national policy toward unions and the direction this policy was taking led the Board in its infancy to be extremely protective of unions. Actions by the employer in regard to union activities were apt to be held unlawful despite the care with which the employer acted to avoid interference, coercion, or restraint.

(1921); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130, 132-33 (1927):

> The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways, may justify what otherwise would be a wrong. . . . Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured.

[4] 29 U.S.C. §§ 141-87 (1970) (originally enacted as Act of July 5, 1935, ch. 372, 49 Stat. 449), *as amended*, 29 U.S.C.A. §§ 152, 158, 169, 183 (Supp. 1975).

[5] 29 U.S.C. § 157 (1970):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

The Board was well aware that a dominant theme in the congressional debates on the Act had been the lawful limits of employer speech during union elections. A proposed section recognizing the first amendment rights of employers had been defeated as "having no proper place in the bill."[6]

Cognizant of the intended effect of the bill, the Board early required that employers adopt a neutral stance toward selection of a union, justifying this position by the relative position of employee and employer:

> As the natural result of the employer's economic power, employees are alertly responsive to the slightest suggestion of the employer. Activities innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationship with his employees.[7]

The Board followed this policy in its decisions,[8] and the federal courts agreed, almost always, with its rationale.[9] In *International Association of Machinists v. NLRB*,[10] the Supreme Court added its agreement:

> Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.

In *NLRB v. Virginia Electric & Power Co.*,[11] the Court acknowledged the right of employers to express opinions as long as neither the opinions nor the manner of expression was coercive. The Court thereby broadened the employer's right to make its feelings known, but in the same opinion the Court adopted a "course of conduct" or "totality of

---

[6] H.R. REP. No. 1371, 74th Cong., 1st Sess. 6 (1935).

[7] 3 N.L.R.B. ANNUAL REP. 125 (1938).

[8] *See, e.g.*, Knoxville Glove Co., 5 N.L.R.B. 559, 561-64 (1938); Protective Motors Serv. Co., 1 N.L.R.B. 639, 647 (1936). *See also* 7 N.L.R.B. ANNUAL REP. 43 (1942).

[9] *See, e.g.*, NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941):

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.

But see NLRB v. Ford Motor Co., 114 F.2d 905, 915 (6th Cir. 1940), *cert. denied*, 312 U.S. 689 (1941).

[10] 311 U.S. 72, 78 (1940).

[11] 314 U.S. 469, 477 (1941).

conduct" approach which to some extent negated the expansion. In adopting the "course of conduct" approach, whereby an isolated statement by the employer was not viewed by itself but in the light of other statements or actions by it, the Court granted the Board—perhaps unwittingly—license to censure even neutral statements by the employer. The Board did, in ensuing years, develop a tendency to hold otherwise permissible speech violative of the Act because of an unrelated unfair labor practice committed by the employer.[12] The "course of conduct" approach was adopted by the courts of appeals,[13] though they were wary of the questionable use of the doctrine employed by the Board.

B. Taft-Hartley and Section 8(c)

Although the Board and courts were perhaps justified by the legislative and social history of the Act in their stringent restriction of employer speech and activity during union campaigns, Congress in the late 1940's reacted adversely to these restrictions and amended the Wagner Act. The Act[14]—now the Taft-Hartley or Labor Management Relations Act[15]—was amended to include a provision explicitly recognizing the right of employers to express their views:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[16]

---

[12] *See, e.g.*, Trojan Powder Co., 41 N.L.R.B. 1308 (1942), *enforced,* 135 F.2d 337 (3d Cir.), *cert. denied*, 320 U.S. 768 (1943).

[13] *See, e.g.*, NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

[14] The amending act was enacted as Pub. L. No. 80-101, 61 Stat. 136 (1947).

[15] 29 U.S.C. §§ 141 *et seq.* (1970), *as amended*, 29 U.S.C.A. §§ 152, 158, 169, 183, 189 (Supp. 1975).

[16] Labor Management Relations Act (Taft-Hartley Act) § 8(c), 29 U.S.C. § 158(c) (1970). There might be some question as to the necessity of section 8(c) since the first amendment ostensibly spelled out the employer's license long before. An employer's speech—or anyone's speech—is of course impliedly subject to countervailing considerations, *i.e.*, the right of employees to join together. The Supreme Court recognized this limitation when it stated in Thomas v. Collins, 323 U.S. 516, 543-44 (1945):

> [O]nce [the employer] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment.

Section 8(c) was apparently a small reminder by Congress to the Board that there are two sides to the question and that employer's rights must be given more than a perfunctory glance. The legislative history indicates that Congress was directing the Board's attention to the Supreme Court decisions on point. *See* 93 CONG. REC. 3953 (1947) (remarks of Senator Taft).

This section of the Act, which applies only in unfair labor practice cases and is not available as a defense to an objection to an election,[17] was prompted by the Board's decisions under the Wagner Act, especially regarding the "course of conduct" approach.[18]

From the enactment of Taft-Hartley and section 8(c) until around 1961, the "course of conduct" approach was deftly ignored, though not explicitly abrogated; the Eisenhower Board and courts examined statements as isolated entities and consistently refused to judge one activity based on other activities. The utilization of such a myopic view of employer conduct inevitably resulted in a significant expansion of permissible employer speech and activity.[19]

C. The Contextual Approach

During the 1960's the Board and the courts returned to a form of the "course of conduct" approach, so that today violations frequently depend not upon the employer's specific statement or action, judged solely upon its face, but upon the contextual setting of the statement.[20] For example, in *Amalgamated Clothing Workers v. NLRB*,[21] the court of appeals, discussing an antiunion sign posted by the employer, stated:

> Counsel for the Board argues that this court should defer to the Board's expertise in interpreting the true meaning of this notice in the context in which it was displayed. In the absence of extrinsic or accompanying circumstances, this notice in and of itself cannot reasonably be construed as a "threat of reprisal or force" as required by the Act. The notice may take a different coloration by virtue of the accompanying circumstances. . . . But the noncoercive character of the notice taken by itself precludes its prohibition unless the Board, endowed with the lens of an expert, provides explanatory findings revealing that the words take on a darker hue when viewed in the perspective of the particular setting.

---

[17] See discussion at note 27 and accompanying text *infra*.

[18] *See, e.g.*, H.R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947). *But see* S. 1126, 80th Cong., 1st Sess. § 8(c) (1947). *See also* Cox, *Some Aspects of the Labor-Management Relations Act, 1947*, 61 HARV. L. REV. 1, 16-20 (1947).

[19] *See* A. COX & D. BOK, LABOR LAW CASES AND MATERIALS 176-77 (7th ed. 1969); Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U.L. REV. 243, 259 (1963); Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 NW. U.L. REV. 594 (1954).

[20] *See, e.g.*, Wagner Indus. Prods. Co., 170 N.L.R.B. 1413 (1968); Lake Catherine Footwear, Inc., 133 N.L.R.B. 443, (1961).

[21] 365 F.2d 898, 910 (D.C. Cir. 1966) (footnote omitted).

The present Board continues to emphasize the contextual setting of an employer's speech or action.[22] Common sense requires that the context generally be determinative, since it is not words which violate the Act, but rather their effect on the employees.[23] For example, in *Hy-Lond Enterprise, Inc.*,[24] a company official who had just received notice of discharge informed employees that her replacement would fire all union supporters. Normally the threat of discharge for organizational activity will be held violative of section 8(a)(1).[25] Here, however, the Board stated:

> The only clear detail about Price's statements which emerges from Watkins' testimony is that, at the time the statements were made, Price was very emotional, spoke in a loud voice, and was almost in tears. For these reasons, the employees, who were aware that Price's employment was about to be or had just been terminated, could reasonably interpret Price's statements, whenever or wherever they were made, as an emotional reaction to her learning of her impending termination. In these circumstances, the employees could not reasonably feel threatened . . . .[26]

D. Unfair Labor Practices and Objectionable Conduct

It should be understood that allegations of improper employer preelection conduct may be presented to the Board in two principal ways, either by *charges* alleging unfair labor practices or by *objections* to an election. The former are filed independently whereas the latter are filed as part of the entire election process.

In a general way it may be said that unfair labor practices are those which are literally proscribed by the Act in section 8. Objectionable conduct is that which violates the spirit of the Act by hindering the employees in their selection of a bargaining representative. Some acts, such as a discriminatory discharge of a union adherent during the "critical period,"[27] constitute both an unfair labor practice and objectionable conduct.[28] Indeed, every act which is an unfair labor practice is also

---

[22] *See, e.g.*, Grede Foundries, Inc., 211 N.L.R.B. No. 101, 86 L.R.R.M. 1401 (June 18, 1974); NVF Co., 210 N.L.R.B. No. 99, 86 L.R.R.M. 1200 (May 20, 1974); O'Connor Chevrolet-Buick, 209 N.L.R.B. No. 90, 85 L.R.R.M. 1419 (March 14, 1974).

[23] *But see* Litho Press, 211 N.L.R.B. No. 143, 86 L.R.R.M. 1471 (June 25, 1974) in which the Board held that regardless of the surrounding circumstances or existence of other unlawful acts, the showing of the infamous movie "And Women Must Weep" is not violative of the Act.

[24] 212 N.L.R.B. No. 77, 86 L.R.R.M. 1567 (July 22, 1974).

[25] See discussion at note 123 and accompanying text *infra*.

[26] 212 N.L.R.B. No. 77, 86 L.R.R.M. at 1568.

[27] The "critical period" is generally the period between the filing of the petition and the election. Only during this period can the employer commit *objectionable* conduct. *E.g.*, Goodyear Tire & Rubber Co., 138 N.L.R.B. 453 (1962).

[28] The four broad categories of conduct constituting both objectionable conduct and unfair labor practices are threats, promises, surveillance, and interrogation.

objectionable conduct if committed during the period between the filing of the petition for election by the union and the election itself.[29] Not all objectionable conduct, however, constitutes an unfair labor practice. For example, appealing to employees' racial biases during a campaign is objectionable but is not an unfair labor practice since it does not constitute a violation of section 8 of the Act.

The remedies for objectionable conduct and unfair labor practices differ significantly. Generally the remedy for an unfair labor practice is that the employer post a notice abjuring such conduct, whereas if an objection is sustained another election will be held.

The test for determining whether conduct is objectionable is whether the conduct has destroyed the "laboratory conditions" necessary to reflect the "uninhibited desires of the employees."[30] Adopted in 1948, this test was immediately the subject of congressional disapproval[31] and was disregarded by the Eisenhower Board.[32] With the emergence of the Kennedy Board, the test was resurrected in *Dal-Tex Optical Co.*[33] and has been consistently used since.

E. Employer Responsibility for the Acts of Others

As a final preliminary to an examination of specific forbidden acts by an employer, one needs briefly to consider the issue of employer responsibility for the acts of subordinates—when will the sins of the children be visited upon the father? Additionally, when will the employer be held liable for acts of third parties?

Section 152(2) of the Act[34] defines an "employer" as including "any person acting as an agent of an employer, directly or indirectly." Thus, the rules of agency were incorporated with the idea that employers

---

[29] Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962) (footnote omitted):
Conduct violative of Section 8(a)(1) is, *a fortiori,* conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).

[30] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[31] *See, e.g.*, S. REP. No. 986, 80th Cong., 2d Sess. 54-55 (1948).

[32] *See* Liberal Mkt., Inc., 108 N.L.R.B. 1481, 1482 (1954):
[T]he Board must recognize that Board elections do not occur in a laboratory where controlled or artificial conditions may be established. We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct. . . . Basically, we feel that the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside.

[33] 137 N.L.R.B. 1782 (1962).

[34] 29 U.S.C. § 152(2) (1970), *as amended,* 29 U.S.C.A. § 152(2) (Supp. 1975).

would be responsible for the acts of others "only when it is within the *actual* or *apparent* scope of their authority."[35]

Obviously, the president and officers of the company are considered "employers" under the law of agency. So, too, are principal stockholders[36] and others in authoritative positions.[37] The basic theory is that if the employees have reason to believe that a person making a coercive statement has knowledge of its truth or can effectuate the statement, then the election will be set aside unless the atmosphere is effectively cleansed of its taint.[38]

As a very general rule, unlawful statements by supervisors, whether or not authorized, will be attributed to the employer.[39] Even when the acts or statements are specifically prohibited by a company official, the employer will be held responsible unless the employees are advised of the prohibition. For example, in *Livingston Shirt Co.*,[40] the president informed employees that supervisors had been instructed to remain neutral and to make no statements concerning the election. Coercive statements were subsequently made by supervisors, but the Board held the company would not be held responsible since the prospective repudiation removed the appearance of authority.[41]

Repudiation by an officer such as the company president may or may not absolve the supervisor's conduct. The factors considered include promptness, perceived sincerity, extent and nature of the improper conduct, presence of other improper acts, and proximity of the elec-

---

[35] H.R. REP. No. 245, 80th Cong., 1st Sess. 11 (1947). Additionally, 29 U.S.C. § 152(13) (1970) provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[36] *Cf.* Chemvet Laboratories, Inc. v. NLRB, 497 F.2d 445 (8th Cir. 1974).

[37] *See, e.g.*, Taylor Mfg. Co. 83 N.L.R.B. 142 (1949) (employer held responsible for unlawful act of his brother); Taylor-Colquitt Co., 47 N.L.R.B. 225 (1943) (employer held liable for actions by wife of a supervisor).

In General Metal Prods. Corp., 164 N.L.R.B. 64 (1967) the company was held responsible for the actions of its attorney. An attorney may lawfully speak to employees. To do so, however, constitutes "persuader activity" and will bring the attorney within the reporting requirements of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433(b)(1) (1970).

[38] J.S. Abercrombie Co., 83 N.L.R.B. 524, 525 (1949).

[39] Edward Bros., 95 N.L.R.B. 1451 (1951). *But see* Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950), *aff'd*, 340 U.S. 498 (1951).

For a good discussion of sufficient "indicia of supervisory status" to create an appearance of authority, see General Tire & Rubber Co., 149 N.L.R.B. 474 (1964).

[40] 107 N.L.R.B. 400 (1953).

[41] *See also* NLRB v. Cleveland Trust Co., 214 F.2d 95, 101-02 (6th Cir. 1954); Otis L. Broyhill Furniture Co., 94 N.L.R.B. 1452 (1951).

tion. Again, in *Livingston Shirt Co.*,[42] where the president promptly informed the employees that he had "not made the statement that if the union gets in here I will close this plant,"[43] the Board held this was sufficient as a retroactive repudiation. In *Miami Coca-Cola Bottling Co.*,[44] however, the Board found that the repudiation and disciplining of a supervisor had no affirmative effect. No explanation was given by the Board, perhaps because of the nature of the supervisor's act—assault upon two union officials. Whether repudiation will be deemed satisfactory depends, in the final analysis, on whether the necessary "laboratory conditions" are reestablished.[45]

Actions by nonsupervisory employees will generally not be attributed to the company. This is consistent with the agency doctrine. For example, in *Marlowe Manufacturing Co.*,[46] action by an employee group campaigning against the union with threats of plant closure was not attributed to the company because of the absence of any authorization or agency relationship. The coercive effect of the acts was not considered.

In *Marlowe*, the Board distinguished the circumstances of that case, where imputation of responsibility was determined solely on the basis of agency, from situations involving third parties (citizens' committees and the like), in which the coercive effect is either the sole determinative or is concomitant with the agency factor. In some instances, groups of citizens, especially in small towns, will mount their own campaigns against unionization. These citizens usually have money invested in the plant or benefit indirectly from the presence of jobs and increased spending power; therefore, the battle cry is usually that the plant will shut down and move elsewhere if the union is elected. Such a threat of plant closure, if made by the employer, would violate the Act.[47] If a company official actually cooperates with the group, then the company will of course be responsible.[48] If there is no cooperation, however, the question of employer responsibility will turn on whether the action brought by the union is for objectionable conduct during a campaign or whether an unfair labor practice is alleged. If the action brought complains of objectionable conduct, then the Board and courts will ex-

---

[42] 107 N.L.R.B. 400 (1953).

[43] *Id.* at 403.

[44] 108 N.L.R.B. 456 (1954).

[45] Note also that an unauthorized and improper act by a supervisor can be ratified by silence or inaction. *See, e.g.*, Amalgamated Clothing Workers v. NLRB, 371 F.2d 740 (D.C. Cir. 1966); J.D. Jewell, Inc., 99 N.L.R.B. 61 (1952).

[46] 213 N.L.R.B. No. 46, 87 L.R.R.M. 1133 (Sept. 17, 1974).

[47] See note 53 and accompanying text *infra*.

[48] *See, e.g.*, Armco Drainage Co., 106 N.L.R.B. 725 (1953) (employer supplied list of employees to local businessmen for use in campaign).

amine only the coercion produced thereby. In such cases, agency has been held immaterial.[49] When an unfair labor practice is complained of, agency will first be looked to, and if it is found, the degree of coercion produced by the third party conduct will then be examined[50] along with the duty or sufficiency of repudiation.[51]

II. Specific Areas of Employer Speech During Union Campaigns

Over the years, the Board has developed an extensive list of do's and don'ts which an employer must closely heed during the campaign. Although the Board frequently speaks of a case-by-case analysis, a number of the forbidden topics of employer speech are virtually per se violative of section 8(a)(1) as being coercive.[52] The employer must either avoid these subjects altogether or phrase them very carefully so as to come within permissible exceptions.

The list of taboos is almost endless. Employers have used almost every imaginable approach in attempting to dissuade employees from voting in favor of unionization. This article will examine the principal restricted areas, including threats of plant closure, appeals to racial

---

[49] *See, e.g.*, James Lees & Sons, 130 N.L.R.B. 290 (1961); Falmouth Co., 114 N.L.R.B. 896 (1955). *But see* Goodyear Clearwater Mill No. 2, 102 N.L.R.B. 1329, 1349 (1953).

[50] *See, e.g.*, Amalgamated Clothing Workers v. NLRB, 371 F.2d 740 (D.C. Cir. 1966). In NLRB v. Lake Butler Apparel Co., 392 F.2d 76 (5th Cir. 1968) the court held that without a showing of agency no degree of coercion will warrant the finding of an unfair labor practice. The third party involved was the local newspaper, and the court, in examining the censorship exercised by the Board, stated that "it would be a dangerous concept for the Labor Board to carve out such an exception to freedom of press rights." *Id.* at 79. *But cf.* NLRB v. Bibb Mfg. Co., 188 F.2d 825 (5th Cir. 1951).

[51] *See* Dean Indus., Inc., 162 N.L.R.B. 1078, 1093 (1967) (footnote omitted):

> [B]efore an employer may be found to have engaged in unfair labor practices by reason of activities on the part of persons not in its employ or management and whom it did not clothe with the apparent authority to act for it, at the minimum, the employer must have acquired knowledge of the activities for which it is sought to be charged and the circumstances must be such as to place the employer under an obligation to disavow activities.

[52] The sometimes automatic assumption that certain campaign techniques are destructive of the requisite "laboratory conditions" is at best unwise. In any campaign innumerable influences are determinative of the outcome, and automatically to cast aside an election because of a single act—by employer or union—is too facile an approach to be accurate. Certainly the Board is aware of the myriad factors involved, opting perhaps for expediency over unobtainable exactitude with the rationale that to do otherwise would be unrealistic. Perhaps the Board is justified in so doing. But as Dean Bok has stated, such per se approaches have frequently been based on "little more than a naked assertion that various tactics tend[ed] to interfere with the election process. As one might expect, decisions of this kind have generally proved unconvincing and unstable." Bok, *The Regulation of Campaign Tactics and Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 42 (1964).

bias, promises of benefits, threats to withdraw benefits, threats to restrict work, threats to discharge union adherents, and substantial misrepresentations.

A. Threatened Plant Closure

An employer may, under certain circumstances and in certain ways, tell employees that the plant will or may close if a union is elected.[53] Generally speaking, the methods for safely informing employees of plant closure are agreed upon, but in the difficult cases there is, unfortunately, inconsistency. One must consider, in predicting the application of the existing law, the relative position of the parties, the effect such a prophecy would likely have on employees, the possibility of employer dissembling, and the usual absence of any scrutiny of the employer's statements after an election won by the union.[54]

1. "Threats" versus "Predictions"

The Board has held that an employer may "predict" that the plant will be closed if it becomes unionized. He may not "threaten" but he may "predict."[55] The distinction between a threat and a prediction should be understood as a categorization of the inference created by the employer, since once again the permissibility of a statement is determined by its import rather than by its linguistic niceties. The Board and the courts have, however, continued to cast the distinction as an objective one, though at times this has become somewhat blurred.[56]

---

[53] A synopsis of actual—as opposed to proposed—plant closure is warranted here.

a. *Permanent complete shutdown*—Held permissible regardless of antiunion animus: Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

b. *Permanent partial shutdown*—Held not an unfair labor practice unless motivated by a desire to chill unionism in the remaining portions of the business, and the employer must reasonably have foreseen such an effect: *Id.* The fact that unionism is chilled does not establish a prima facie unfair labor practice as there must be improper motivation: Motor Repair, Inc., 168 N.L.R.B. 1082 (1968).

c. *Temporary shutdown*("runaway shop")—Held to require a balancing of economic motivation as against the desire to thwart unionization. If the economic motive outweighs the antiunion motive, then the move is not an unfair labor practice: NLRB v. Rapid Bindery, Inc. 293 F.2d 170 (2d Cir. 1961).

[54] *I.e.*, if the union wins, obviously no objections to the employer's conduct will be filed, and no effectuation of his prophecy needs be forthcoming. Therefore, win or lose, the employer knows that he will not actually have to close.

[55] *See* A. Cox, Law and the National Labor Policy 42-43 (1960). Additionally, see note 116 and accompanying text *infra*.

[56] *See, e.g.*, Pierce Governor Co., 181 N.L.R.B. 922, 925 (1970): "In this context I find that the employees would reasonably interpret Respondent's predictions as threats of reprisal . . . ." More accurate would have been: In this context I find that the employees would reasonably interpret Respondent's statements as threats of reprisal rather than as predictions.

2. *NLRB v. Gissel Packing Co.*

In 1969 the Supreme Court in *NLRB v. Gissel Packing Co.*,[57] announced the ground rules for "predictions" of plant closure.

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof."[58]

This rather lengthy rule of law had been presaged by numerous Board decisions[59] and by various court of appeals decisions.[60] Should an employer believe that it will not be able to remain competitive if the union is elected and determine to inform its employees of a predicted shutdown, it has two choices under *Gissel*. First, and more simple, is the use of "a management decision already arrived at to close the plant in case of unionization."[61] Unless the decision is a sincere one, however,

---

[57] 395 U.S. 575 (1969).

[58] *Id.* at 618-19 (citations omitted).

[59] *See, e.g.*, Jones Packing Co., 159 N.L.R.B. 988 (1966); Bilton Insulation, Inc., 129 N.L.R.B. 1296 (1961); Chicopee Mfg. Corp., 107 N.L.R.B. 106 (1953); Electric Steel Foundry, 74 N.L.R.B. 129 (1947).

[60] *See, e.g.*, NLRB v. Lake Butler Apparel Co., 392 F.2d 76 (5th Cir. 1968); NLRB v. River Togs, Inc., 382 F.2d 198 (2d Cir. 1967); International Union of Elec., Radio and Mach. Workers v. NLRB, 289 F.2d 757 (D.C. Cir. 1960).

[61] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274 n.20 (1965), *cited in* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

> Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision. We recognize that this safeguard does not wholly remove the possibility that our holding may result in some deterrent effect on organizational activities indepen-

with an honest intent that it will be carried out, it should be avoided, since to renege after a union victory would obviously create a disadvantageous psychological position for management.

The alternative approach for an employer is to make a "prediction" which is "carefully phrased on the basis of objective fact." As one might suppose, however, this is not so simple as it might sound, and a reading of the entire passage from *Gissel* indicates the rigorous standard the Court intended to establish. There must be a showing of the factors indicating the probability of closing. This may be accomplished, for example, by a comparison of the union's proposed wage increase demand[62] with the current salaries, and a projection of the increased labor costs as against the projected profit margin. There may be no hint of antiunion motivation nor may there be an implication of employer choice. In effect, the only permissible prediction under *Gissel* should be a completely disinterested fiscal projection. Of course, every employee will realize that some employer discretion to shut down or continue will always exist. For this reason the Board and the courts have retreated somewhat from the *Gissel* formula, which, in its last command, requires that "the eventuality of closing [be] capable of proof."[63] The courts and the Board have, to some extent, come to consider both the content of the employer's declaration and the reasonable inferences created

---

> dent of that arising from the closing itself. An employer may be encouraged to make a definitive decision to close on the theory that its mere announcement before a representation election will discourage the employees from voting for the union, and thus his decision may not have to be implemented. Such a possibility is not likely to occur, however, except in a marginal business; a solidly successful employer is not apt to hazard the possibility that the employees will call his bluff by voting to organize. We see no practical way of eliminating this possible consequence of our holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close. We do not consider the matter of sufficient significance in the overall labor-management relations picture to require or justify a decision different from the one we have made.

The forecast of insignificance has been proved true.

[62] The employer must have a reasonable basis for the belief that union wages will create financial difficulty. *See, e.g.*, NLRB v. River Togs, Inc., 382 F.2d 198, 201 (2d Cir. 1967); NLRB v. Miller, 341 F.2d 870, 872-73 (2d Cir. 1965). The employer thus cannot merely assume that union wage demands will be "exorbitant" or "financially impossible." *See* Jones Packing Co., 159 N.L.R.B. 988 (1966) (employer gratuitously—and therefore wrongfully—assumed higher wage demand as basis for prediction of shutdown).

The employer generally must have specific projected union demands such as national wage scale achievement or other dollar-and-cents figures. Normally the union will promise employees a specific wage increase upon which the employer may rely. Otherwise, the employer will not be able to demonstrate his prediction as required.

[63] 395 U.S. at 618-19.

thereby.[64] While this may frustrate the legal purist, it should not. Employees in a fairly successful business will balance the element of choice residing in the employer against the desire to continue to operate and the economic unfeasibility of closing.

Recent Board decisions reflect the quasi-contextual approach adopted. In *May Department Stores*,[65] the employer, responding to union campaign criticism of expenditures for improvements for the urban store (*e.g.*, chandeliers and carpeting), told employees during an antiunion speech, "If I can't work at the difficult job of turning this downtown store around, I just have to abandon it." The Board held that this was merely an emotional reaction to the union criticism and would be understood as such by the employees. In *Dart Industries*,[66] a supervisor told an employee that if the union were elected and the store no longer were competitive, it would close. The Board held this was not objectionable conduct since the employee initiated the conversation, which was friendly, and there were no other suggestions of closure and no threatened reprisals.[67]

May an employer simply tell the employees that he cannot afford to pay wages provided in the proposed union contract and will close if the union wins the election? There are conflicting Board decisions which can only lead to a circumspect use of such a tactic. In *Parkwood IGA*[68] the Board cryptically decided that such a statement was a section 8(a)(1) violation since no objective economic justification was given. In *Leboe Tire & Rubber Co.*,[69] the Board, in an equally cryptic decision, held that section 8(a)(1) was not violated when a supervisor told an employee that the company would go out of business if the union won and demanded the same wages as at other stores. The Board held this was an objective prediction based on known economic facts. It should be obvious, however, that this does not come within the strictures of *Gissel*.[70]

In the final analysis, the employer must be extremely careful before

---

[64] See NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1107 (9th Cir. 1971). *See generally* NLRB v. Automotive Controls Corp., 406 F.2d 221, 223 (10th Cir. 1969) ("[G]enerally the test of coerciveness is one of total impact to be determined in light of the background in which the statement is made.").

[65] 211 N.L.R.B. No. 14, 86 L.R.R.M. 1423, 1424 (June 7, 1974).

[66] 210 N.L.R.B. No. 163, 86 L.R.R.M. 1294 (May 30, 1974).

[67] *See also* NLRB v. Acker Indus., Inc., 460 F.2d 649 (10th Cir. 1972). Note that it is not necessary for all employees to hear a statement in order to violate section 8(a)(1). So long as there is a "good chance of an impact upon employee free choice," a violation may be found. Hertzka & Knowles v. NLRB, 503 F.2d 625, 628 (9th Cir. 1974), *citing* NLRB v. Clapper's Mfg. Co., 458 F.2d 414, 417-18 (3d Cir. 1972).

[68] 201 N.L.R.B. 905 (1973), *enforced sub nom.* Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131 (7th Cir. 1974).

[69] 208 N.L.R.B. No. 12, 85 L.R.R.M. 1550 (Jan. 3, 1974).

[70] *See* Oscar Enterprises, Inc., 214 N.L.R.B. No. 111, 87 L.R.R.M. 1575 (Nov. 11, 1974) (Member Kennedy, dissenting).

prophesying plant closure in case of unionization. The Board and courts are cognizant of the potential for abuse of doomsday forecasts and, despite the partial withdrawal from the language of *Gissel*, still view projections of plant closure with disfavor.

B. Appeals to Racial Prejudice

Any employer considering the use of any information containing a racial theme, however oblique, would do well not to. The Board and the courts are unanimous in their deprecation of such campaign tactics.

The Board held in 1958, in *Sharnay Hosiery Mills, Inc.*,[71] that the mere mention of racial considerations was not in itself improper so long as there was no misrepresentation, coercion, violence, or fraud.[72] This doctrine was expanded in companion cases in 1962—*Sewell Manufacturing Co.*[73] and *Allen-Morrison Sign Co.*[74]—in which the Board established the rule that:

> So long . . . as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane . . . .[75]

In myriad factual settings,[76] this rule has been consistently applied by the Board. Few cases other than *Sharnay* and *Allen-Morrison*, however, have dealt with ostensibly temperate racial statements in which an employer informed white employees of the prointegration stance of the union.[77] Thus, it is difficult to predict whether an employer today may safely make such a temperate statement. The problem, of course, lies in relevancy, and one should note that the distinction between the

---

[71] 120 N.L.R.B. 750 (1958).

[72] The Board noted the absence of intemperate or inflammatory racial remarks. *Id.* at 751.

[73] 138 N.L.R.B. 66 (1962).

[74] 138 N.L.R.B. 73 (1962).

[75] Sewell Mfg. Co., 138 N.L.R.B. 66, 71-72 (1962) (footnote omitted).

[76] In P.D. Gwaltney, Jr. & Co., 74 N.L.R.B. 371 (1947), a pre-*Sewell Mfg.* decision, the Board threw out an election in which an employer had, among other things, threatened the employees (80 percent of whom were black) that if the union were elected the Ku Klux Klan would quickly recrudesce.

[77] *See* Standard Prods., Co., 159 N.L.R.B. 159 (1966), in which the Board upheld an employer's statement stressing unity of Southerners and urging all true "Rebels" to stick together. No explicit mention of race was made. It should not be assumed from this, however, that tacit racial appeals will not be stricken. Perhaps the Board assumed that because the company was in Kentucky the employees would not understand the meaning of the rallying cry.

propaganda used in *Sewell* and that used in *Allen-Morrison* was in its temperateness. Both involved equally relevant or irrelevant information. One therefore may assume that the degree of relevancy depends on the volatility of the approach and is thus a subservient criterion. To hypothesize, then, suppose an employer calmly tells the employees that the union has given money to the National Democratic Party, CORE, NOW, NAACP, and the United Negro College Fund. Would this be permitted? Depending perhaps on the context of the statement and the manner of presentation, one may with some certainty predict that it would be allowed. This is another borderline area, however, and should be approached, if at all, with much caution.

In a similar vein, the Board has consistently held that employers may not tell employees that unionization will mean in-plant integration.[78] For example, in *Kay Corp.*[79] the Board found objectionable the employer's comment that if the union won the election blacks would have to be hired and employees would "have to work alongside blacks." The Board held that there were two principal objections to such propaganda: first, it implied a layoff of present employees; second, the predicted change in working conditions would be found onerous by some.

The Board has created minor exceptions to its proscription against the use of racial propaganda by an employer. Generally, mere use of isolated derogatory racial comments does not constitute a section 8(a)(1) violation.[80] Additionally, the Board has held that an employer may inform minority employees that the union discriminates against minorities, although it characterized this tactic as "dangerous."[81] If used, the approach should be low-key and factual.

Note that the Board and courts have generally upheld appeals by unions to blacks urging solidarity and economic security if the union is elected. The distinction has been made that such appeals are directed

---

[78] This ploy has of course been largely mooted by Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (Supp. III, 1973).

[79] 209 N.L.R.B. No. 7, 85 L.R.R.M. 1574 (Feb. 13, 1974), *citing* Bush Hog, Inc., 161 N.L.R.B. 1575 (1966), *enforced* 405 F.2d 755 (5th Cir. 1968); *cf.* Glazers Wholesale Drug Co., 209 N.L.R.B. No. 175, 86 L.R.R.M. 1161 (April 8, 1974). *See also* Empire Mfg. Co., 120 N.L.R.B. 1300 (1958).

[80] *See* Booth, Inc., 190 N.L.R.B. 675 (1971). *But cf.* Kuhlman Corp., 210 N.L.R.B. No. 116, 86 L.R.R.M. 1671 (May 21, 1974) (*semble*).

An employer should also be aware of the requirements of Title VII in this regard:

> Title VII requires an employer to maintain an atmosphere free of racial and ethnic intimindation [*sic*] and insult. That requirement includes positive action where . . . necessary to redress or eliminate employment intimidation.

EEOC Decision No. 74 05, 6 F.E.P. CAS. 834 (1973).

[81] Snap Out Binding & Folding, Inc., 166 N.L.R.B. 316 (1967). *But see* Media Mailers, Inc., 191 N.L.R.B. 251 (1971).

to racial self-consciousness rather than racial animosity and are therefore permissible.[82]

C. *Promise of Benefits*

Section 8(c) of the National Labor Relations Act provides that an employer may express views and opinions as long as they contain "no threat of reprisal or force or promise of benefit."[83] Thus, the Board and courts have found that employer inducements to vote against the union, whether crass and obvious or sophisticated and subtle, will cause an election to be invalidated.

1. Promises of Benefits

There had been some doubt prior to 1964 whether an employer's promise of benefits during an election campaign was violative of the National Labor Relations Act. This doubt was resolved succinctly by the Supreme Court in *NLRB v. Exchange Parts Co.*,[84] wherein the Court stated:

> We have no doubt that it [section 8(a)(1)] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect. . . . The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.[85]

The determining factor in deciding whether an employer has violated section 8(a)(1) by unlawfully promising benefits to employees has frequently been the employer's purpose or motive.[86] This issue most often arises in connection with the announcement of a conferred or potential benefit. For example, suppose that on April 1 an employer

---

[82] *See, e.g.*, Bancroft Mfg. Co., 210 N.L.R.B. No. 90, 86 L.R.R.M. 1376 (May 29, 1974); Baltimore Luggage Co., 162 N.L.R.B. 1230, *enforced*, 387 F.2d 744 (4th Cir. 1967); Archer Laundry Co., 150 N.L.R.B. 1427 (1965). *But see* NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675 (4th Cir. 1966) (distinguished in *Baltimore Luggage*).

[83] 29 U.S.C. § 158(c) (1970). Note that there is no such statutory restriction of the union's right to promise benefits. The most effective restraint is that against misrepresentation, discussed at note 149 and accompanying text *infra*.

[84] 375 U.S. 405 (1964).

[85] *Id.* at 409 (footnote omitted).

[86] *See* J.P. Steven & Co. v. NLRB, 461 F.2d 490, 492 (4th Cir. 1972); Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1306 n.136 (1968).

decides to grant a wage increase to become effective January 1 next. No announcement is made. On May 1 the union begins its organizational activity and on June 1 files its petition, with the election set for August 15. On August 1 the employer informs the employees that an increase will become effective on January 1. It may be argued that the key is not the announcement which is determinative but the decision to confer the benefit which, as in the example, was made prior to any union activity and thus was without the proscribed motive.[87] The Board and courts have, however, consistently held that:

> [T]he granting of employee benefits during the period immediately preceding an election is not *per se* ground for setting aside an election. However, in the absence of a showing that the timing of the announcement was governed by factors other than the pendency of the election, the Board has set aside elections on the grounds that the granting of benefits at that particular time was calculated to influence the employees in their choice of a bargaining representative. The burden of showing these other factors is on the Employer.[88]

The timing of the announcement is an important factor, and if it is fairly close to the election the employer will have difficulty justifying his action.[89]

Where an employer has an established practice of granting annual wage increases, the promise during the campaign that this will continue with or without the union has been held permissible.[90] Where the promise to raise wages after an election is conditioned upon the defeat of the union, however, an objection will probably be sustained.[91]

2. Solicitation of Grievances

An employer may not, during the course of a campaign, approach employees and ask if they have any complaints or grievances. The Board has consistently held that where

---

[87] *See* Hineline's Meat Plant, Inc., 193 N.L.R.B. 867, 868 (1971) (Chairman Miller, dissenting).

[88] International Shoe Co., 123 N.L.R.B. 682, 684 (1959) (footnotes omitted).

[89] *See* J.P. Steven & Co. v. NLRB, 461 F.2d 490, 493 (4th Cir. 1972). For cases in which the employer met his burden, see NLRB v. M.H. Brown Co., 441 F.2d 839 (2d Cir. 1971); Essex Int'l, Inc., 216 N.L.R.B. No. 101, 1974-75 CCH NLRB Dec. ¶ 15,486 (Feb. 12, 1975).

The Board will also look to the type of benefit promised, and if it resembles the promise made by the union, an unlawful motive will be presumed. *See* Goodyear Tire & Rubber Co., 170 N.L.R.B. 539 (1968), *enforced* 413 F.2d 158 (6th Cir. 1969); Seneca Plastics, Inc., 149 N.L.R.B. 320 (1964).

[90] *See, e.g.*, Louisiana Plastics, Inc., 173 N.L.R.B. 1427 (1968).

[91] *Compare* Ramada Inns, Inc., 208 N.L.R.B. No. 149, 85 L.R.R.M. 1447 (Jan. 24, 1974), *with* Shop-Rite Dev. Co., 215 N.L.R.B. No. 144, 88 L.R.R.M. 1077 (Dec. 16, 1974).

> an employer who has not previously had a practice of soliciting employee complaints, institutes such a practice to coincide with an organizational campaign, the employer has engaged in improper interference with his employees' freedom of choice in violation of Section 8(a)(1).[92]

Where the employer has an established practice of listening to complaints, the objection normally will not be sustained.[93]

Solicitation of grievances is an unlawful promise of benefit because it "warrant[s] an inference by the employees that their employer intends to try to do something about their grievances."[94] Of course, if the employer expressly states that he cannot assure that the grievances will be rectified[95] or if no such promise can reasonably be inferred,[96] then no unlawful act has been committed.

In *Essex International, Inc.*,[97] the Board reached a decision which may indicate a new direction in this area. During the campaign period two employees had approached the employer and stated that they were voting for the union because of existing favoritism by supervisors. The next day the employer promised to correct the favoritism. The Board held that this was not a promise to correct grievances but rather was a statement designed to call attention to an existing company policy adopted without regard to the campaign. Should this rule be consistently applied, it would amount to a significant erosion of the prohibition against solicitation of grievances, since it implies that although grievances may not be solicited, promises to enforce existing policies in order to correct unsolicited grievances may be made.

D. Threatened Withdrawal of Benefits

A threat to withdraw employee benefits is specifically outside the aegis of section 8(c) of the National Labor Relations Act as it constitutes a threat of reprisal.[98] When an employer's statement is clearly a threat

---

[92] Ring Metals Co., 198 N.L.R.B. No. 143, 81 L.R.R.M. 1001, 1002 (Aug. 22, 1972) (footnote omitted).

[93] *See* Burns Int'l Security Serv., 216 N.L.R.B. No. 1, 88 L.R.R.M. 1097 (Jan. 3, 1975).

[94] Fairchild Camera & Instrument Corp., 169 N.L.R.B. 90, 92 (1968). *See also* Pur O Sil, Inc., 211 N.L.R.B. No. 32, 86 L.R.R.M. 1437 (June 11, 1974).

[95] *See* Uarco, Inc., 216 N.L.R.B. No. 2, 88 L.R.R.M. 1103 (Dec. 31, 1974).

[96] *See* Dart Indus., 210 N.L.R.B. No. 163, 86 L.R.R.M. 1294 (May 30, 1974).

[97] 211 N.L.R.B. No. 112, 86 L.R.R.M. 1411 (June 19, 1974).

[98] Actual withdrawal of benefits is, of course, equally unlawful. *See, e.g.*, Buddy Schoellkopf Prods., Inc., 164 N.L.R.B. 660 (1967). For a discussion of the sometimes difficult question of granting or withholding wage increases during a campaign, *compare* Heckethorn Mfg. Co., 208 N.L.R.B. No. 46, 85 L.R.R.M. 1469 (Jan. 10, 1974), *with* Great Atl. & Pac. Tea Co., 166 N.L.R.B. 27 (1967), *enforced in part and remanded in part*, 409 F.2d 296 (5th Cir. 1969).

It has frequently been said that an employer must not grant or withhold benefits

to retaliate against employees should they select the union, the Board will not hesitate to invalidate an election lost by the union.[99] In assaying campaign propaganda, the employer must be careful to avoid any implication that unilateral steps will be taken against the employees.

Once again, however, the employer is faced with the question of exactly what is a "threat." Specters of the "threat"—"prediction" dichotomy arise again, with equally uncertain results. In *Island Holidays, Ltd.*,[100] the employer stated during the campaign that if the union were selected the employer would have to enforce more strictly the work rules since the union contract at other hotels in the area called for termination if an employee did not abide by house rules. Thus, the employer "predicted" a more stringent observance of dress codes and a discontinuance of supervisors' filling in for unit line workers. The Board held that this was a permissible prediction of the foreseeable consequences of unionization. To this extent, then, the employer may "predict" curtailment of certain company policies that it knows would violate the union contract.

> It is well established law that an employer has the right to express opinions or predictions of unfavorable consequences which he believes may result from unionization. Such predictions or opinions are not violations of the National Labor Relations Act if they have some reasonable basis in fact and provided that they are in fact predictions or opinions rather than veiled threats . . . .[101]

The difficult question in this area concerns employer statements that it will "bargain from scratch" if the union is selected. Before turning to the case law specifically addressing this question, it is first necessary to understand the possible interpretations of "bargaining from scratch." To an employee in the shop listening to a speech, such a phrase, without elucidation, may convey a threat that the employer will unilaterally withdraw all fringe benefits and reduce pay to the minimum wage during negotiations. Since the employer cannot unilaterally change fringe benefits but must bargain in good faith with respect to

---

based on the union's presence but must act as it would have absent any organizational activity. *See* Gates Rubber Co., 182 N.L.R.B. 95 (1970). Such a purblind approach is, however, more easily prescribed than performed, and in many instances the employer's conduct is necessarily dictated by the presence of the union. For example, any unusual increase in benefits during a campaign may very well result in a rerun election. Absent convincing evidence to the contrary, the Board simply will not believe that the employer did not purposefully time the grant to coincide with the campaign.

[99] *But see* Fort Smith Broadcasting Co. v. NLRB, 341 F.2d 874 (8th Cir. 1965) (threatened withdrawal of friendship not a violation of the Act).

[100] 208 N.L.R.B. No. 145, 85 L.R.R.M. 1225 (Feb. 8, 1974).

[101] NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1105 (9th Cir. 1971) (stressing absence of antiunion animus), *citing* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

them, this statement, so understood, clearly is not a prediction of what the employer lawfully may do. On the other hand, bargaining is a give and take process, and an employer may lawfully bargain from a minimum position. During negotiations, the employer may not reduce employee benefits, but such a reduction may result from the bargaining process.

The key, therefore, in vowing to bargain from scratch is that the employer must not indicate to employees that benefits will unilaterally be withdrawn, but he may indicate that his position during negotiations with the union, if elected, will be a minimum one and that bargaining does not necessarily mean that employee benefits will be increased.

> The Board in considering the impact on employee free choice of "bargaining from scratch" statements . . . has distinguished circumstances in which such remarks could reasonably be read in context as a threat to discontinue existing benefits from instances in which such remarks are merely descriptive of the employer's bargaining strategy, designed to let employees know that unionization does not mean automatic increases in benefits.[102]

The employer should be wary of any express pronouncement that employee benefits might be reduced by bargaining, although the Board has sanctioned the use of such a statement when accompanied by an accurate explanation of the bargaining process.[103] The Board in *Computer Peripherals, Inc.*,[104] allowed a statement that "if you think I am going to start bargaining from where I am now, you've got another thing coming. I'm going to start from scratch, a minimum proposal . . . . Bargaining is just that, give and take." Noting the absence of other threatening remarks the Board upheld the comment since there was no implication of unilateral removal of benefits; "rather the emphasis was on the possible results of lawful bargaining with that Union."[105]

When the declaration to bargain from scratch is not a per se violation (*i.e.*, does not threaten unilateral withdrawal of benefits) but is strictly limited to that vow, without more, the employer places himself at the mercy of a multitude of factors, chief among which is "whether under [the] circumstances the employees could reasonably conclude that the employer was threatening them with economic reprisals."[106] The circumstances determining the reasonableness of such a conclusion include the statement itself, whether an employee elicited the state-

---

[102] Host Int'l, Inc., 195 N.L.R.B. 348 (1972) (footnote omitted).

[103] *See* Stumpf Motor Co., 208 N.L.R.B. No. 68, 85 L.R.R.M. 1113 (Jan. 16, 1974).

[104] 215 N.L.R.B. No. 22, 88 L.R.R.M. 1027 (Dec. 5, 1974). *See also* Trent Tube Co., 147 N.L.R.B. 538 (1964).

[105] 215 N.L.R.B. No. 22, 88 L.R.R.M. at 1028.

[106] NLRB v. Louisiana Mfg. Co., 374 F.2d 696, 702 (8th Cir. 1967).

ment, whether other unfair labor practices were committed, and whether the employer generally evinced antiunion animus.[107] Such a contextual approach[108] can be avoided by an accurate and fairly detailed explanation of bargaining. None of the import—but most of the worry—is lost by such elucidation.

E. Threatened Work Restrictions

Threats to increase employees' workloads[109] or make their employment more arduous[110] as a result of unionization will generally be held violative of the Act. In *Home Comfort Products Co.*,[111] however, the Board refused to censure a supervisor's statement to an employee that unionization would create a more formal, less intimate working relationship. The Board in *Fort Smith Broadcasting Co.*[112] did find that threatened withdrawal of friendship was as coercive as threatened job reprisal and constituted a section 8(a)(1) violation. The Eighth Circuit denied enforcement,[113] finding that such an "intangible, non-economic reprisal as the withdrawal of friendship does not tend to inhibit the right of an employee to engage in . . . self-organization."[114]

A more common type of work restriction forecast is reduction in overtime because of higher wage demands by the union. Once again the statement will be evaluated in light of *Gissel*: Was an objective economic basis given for the statement; was there a suggestion of employer control and possible unilateral action; was the comment demonstrably provable? Additionally, the context of the statement will be examined.[115]

The Board has been fairly consistent in its approach to such cases. In *Yankee Trader, Inc.*,[116] a company official was asked what would happen to overtime if the union were elected since the union had a practice of not allowing employees to work more than 40 hours. The employer stated that he "didn't know, but from what I underst[an]d,

---

[107] NLRB v. Saunders Leasing Sys., Inc., 497 F.2d 453, 457 (8th Cir. 1974).

[108] Wagner Indus. Prods. Co., 170 N.L.R.B. 1413 (1968).

[109] *See, e.g.*, Quality Rubber Mfg. Co., 176 N.L.R.B. 40 (1969), *enforced per curiam sub nom.* United Steelworkers v. NLRB, 430 F.2d 519 (D.C. Cir. 1970).

[110] *See, e.g.*, Cleghorn Folding Box Co., 167 N.L.R.B. 656 (1967). *But see* Sanford Finishing Corp., 175 N.L.R.B. 366 (1969).

[111] 180 N.L.R.B. 597 (1970).

[112] 146 N.L.R.B. 759 (1964).

[113] Fort Smith Broadcasting Co. v. NLRB, 341 F.2d 874 (8th Cir. 1965).

[114] *Id.* at 879.

[115] NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1107-08 (9th Cir. 1971). *See also* Stumpf Motor Co., 208 N.L.R.B. No. 68, 85 L.R.R.M. 1113 (Jan. 16, 1974) (nature of conversation nonthreatening).

[116] 184 N.L.R.B. 715 (1970).

the union would have to put on 'x' number of people so that the house could not afford to pay overtime . . . ." Citing *Gissel*, the Board stated that the employer, as he had admitted, did not know what the union demands would be and, equally important, did not know what the company's response would be. Therefore, his response was deemed speculative and a violation of section 8(a)(1).[117] This case illuminates an interesting point. In *Gissel*, to reiterate, the Supreme Court required that in order to be protected, "the prediction must be carefully phrased on the basis of objective fact . . . ."[118] The essence of the *Gissel* rule is that the employer's statement must be couched in absolutist language—no ifs or maybes. The employer's statement in *Yankee Trader* was thus defective *ab initio* when he stated that he "didn't know, but . . . ." But what if there had been no such disclaimer? The Board ostensibly strays from *Gissel* in its requirement that not only must the employer sound as though he knows what he is talking about, he must indeed know exactly whereof he speaks. Not only can there be no hint of speculation, there can be no speculation. One might argue that the further *Gissel* commandment that the prophecy be "capable of proof"[119] confirms this requirement of accuracy. Of course, proof of a future occurrence is epistemologically impossible, and thus this seeming afterthought of the Court has been for the most part conveniently ignored.

Logically, there must be a requirement that an employer have a sound factual basis for any "prediction" he makes. This is as important as the dogmatic posture required by *Gissel*; otherwise it would have no meaning, since baseless dogmatism is potentially more harmful than accurate ambivalence. The Board in *Yankee Trader*, however, required too much; it should have inquired into the actual justification for the comment.[120] Obviously the company official did not *know* what the company's response would be; no one can possess certainty about such a matter.[121] Nor did he *know* what the union would do. In other words, there will always be an element of speculation in any prediction, and

---

[117] *But see* Russel-Newman Mfg. Co. v. NLRB, 370 F.2d 980, 986 (5th Cir. 1966) (employer's statement that it was his understanding that union plants "generally shut down as soon as the work runs out" held permissible).

[118] 395 U.S. 575, 618 (1969).

[119] *Id.* at 619.

[120] *See generally* Media Mailers, Inc., 191 N.L.R.B. 251, 252 (1971) (Chairman Miller, dissenting).

[121] The closest one could come to knowing the company's response would be if the board of directors were to decree that such a response to unionization would be made. Even then, of course, the decree is revocable, and any statement based thereon is to that extent speculative. Since such a situation was specifically approved as an alternative in *Gissel,* however, the Court obviously meant to allow for less certain prognostications.

the Board and courts should allow for this element of guesswork if the forecast is a reasonable one based on experience and logic.[122]

F. Threatened Discharge

Section 8(a)(1) clearly proscribes a threat of discharge by an employer. Such a threat thus constitutes an unfair labor practice and, a fortiori, objectionable conduct.[123] Not only are express threats of discharge unlawful,[124] but also forbidden are implied threats which, though lacking the explicit language, lack none of the intimidation. In determining whether such vague or implied threats are unlawful, a variety of factors must be examined, including antiunion animus, other threats by the employer, the substance of the statement, and the relationship between the speaker and the employees.[125] The Board has held it unlawful to state that union adherents will be "left out in the cold,"[126] to refer to others who have been fired for union activity in the company,[127] or to take mass applications in front of the employees.[128] On the other hand, where circumstances indicate that no threat could reasonably be inferred by the employees, the statement will not be found violative of the Act.[129] An employer must be extremely careful to avoid any implication that union activity or unionization might result in discharge, and comments which otherwise might seem innocuous should be closely edited.

A more difficult problem in this area concerns the following situation: Management, aware of unionization activities and aware of the union's contracts with other plants, tells the employees that the union will demand certain contract provisions which he will refuse; the union will strike; the employer will not shut down and, in fact, will permanently replace all those employees who refuse to cross the picket line. Myriad legal problems are suggested by this oft-repeated scenario.

First of all, an employer can inform employees that economic strikers[130] can be permanently replaced.[131]

---

[122] *See* Laborers' Dist. Council v. NLRB, 501 F.2d 868 (D.C. Cir. 1974).

[123] Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962).

[124] *See, e.g.*, Southwire Co. v. NLRB, 383 F.2d 235 (5th Cir. 1967).

[125] *See* NLRB v. Community Motor Bus Co., 335 F.2d 120 (4th Cir. 1964).

[126] Ruby Concrete Co., 213 N.L.R.B. No. 103, 87 L.R.R.M. 1672 (Sept. 27, 1974).

[127] David-Anna Corp., 208 N.L.R.B. No. 22, 85 L.R.R.M. 1162 (Jan. 23, 1974).

[128] Glazer Steel Corp., 163 N.L.R.B. 7 (1967).

[129] *See, e.g.*, Hy-Lond Enterprise, Inc., 212 N.L.R.B. No. 77, 86 L.R.R.M. 1567 (July 22, 1974), discussed at text accompanying notes 24-26 *supra*.

[130] Economic strikers are those striking for higher wages or improved benefits. Unfair labor practice strikers are those protesting what they consider unlawful employment practices by the employer. Unfair labor practice strikers may be replaced during the term of the strike but must be offered their jobs when the strike ends unless they are guilty of misconduct during the strike.

[131] *See* Oxford Pickles, 190 N.L.R.B. 109 (1971). Note that an employer cannot state

Second, an employer must bargain "in good faith" with the union[132] and cannot precipitously refuse any possible union proposal without first allowing the union to present the proposal.[133]

Third, an employer cannot create an impression that unionization is a mere exercise in futility.[134]

Fourth, an employer is once again faced with the *Gissel* "threat" versus "prediction" problem. Does he *know* that the union will seek the contract provision? Does he *know* what the company's response will be?

One may assume that, based on the numerous factors involved, the legality of such conduct by the employer is difficult to determine, as is the proper process by which to make that determination. Unfortunately, the Board has not been inclined to disentangle this reticular problem. Nor shall this article seek to do so, since this is itself a proper subject for an article.

The various cases offer unsatisfactory and facile solutions, and one is hard pressed to arrive at any conclusion whether or why an employer may engage in the above described conduct. Two 1974 cases illustrate the problem: *O'Neill Moving & Storage, Inc.*[135] and *Four Winds Industries, Inc.*[136] In both cases the employer represented that the union would demand a union security clause. Both employers stated that they did not believe they had "any right to force any of our people to join any union to keep their jobs" and that a strike would be forthcoming. Both stated that they would not "close down operations for even one day" and that the strikers would be permanently replaced.[137]

Despite the virtually identical propaganda utilized, the Board in *O'Neill* held the tactic permissible as an explanation of the employer's "position on the issues and what it predicted would be the Union's

---

that economic strikers can be fired, because they cannot. They may be permanently replaced, but they must be put on a preferential hiring list if an unconditional offer to return to work is made.

[132] 29 U.S.C. § 158(a)(5) (1970).

[133] *See generally* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).

[134] Where an employer states "either expressly or by clear implication, that it [will] not bargain in good faith with a union even if it were selected by the employees," the election will be set aside. American Greetings Corp., 146 N.L.R.B. 1440, 1445 n.4 (1964). What of a threat to impede indeterminately the unionization attempt by protracted litigation? *Compare* Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1783 (1962), *with* Jeffries Truck Parts & Equip., Inc., 216 N.L.R.B. No. 26, 88 L.R.R.M. 1161 (Jan. 15, 1975) (employer lawfully told employee it was willing to spend $20,000 to keep union out).

[135] 209 N.L.R.B. No. 82, 85 L.R.R.M. 1488 (March 15, 1974).

[136] 211 N.L.R.B. No. 60, 86 L.R.R.M. 1453 (June 13, 1974).

[137] The attorney for the employer in *Four Winds* was either the same attorney in *O'Neill* or was relying thereon since the conduct there had been sanctioned by the Board. The former supposition seems more plausible since both firms are based in Santa Anna, California.

position with regard to its area contract . . . ."[138] The Board in *Four Winds*, on the other hand, characterized the tactic as a "bad-faith anticipated refusal to bargain about union security"[139] and therefore found it to be a section 8(a)(1) violation. The Board in *Four Winds* did find that there was other objectionable conduct (*i.e.*, unlawful discharge) and stated: "When considered with the other violations hereinafter found, these statements, in our opinion, abridged employee rights guaranteed by Section 8(a)(1) of the Act."[140]

To attempt to resolve the cases on the basis of the additional objectionable conduct in *Four Winds* would be erroneous, however, since: (1) The Board in *Four Winds* went on to state that the employer's language in and of itself "clearly amount[ed]" to impermissible threats;[141] (2) the Board in *O'Neill* distinguished its facts from those in *Tommy's Spanish Foods, Inc.*,[142] while the Board in *Four Winds* found the same facts indistinguishable from *Tommy's Spanish Foods, Inc.*; and (3) were the presence of other unlawful conduct the basis for the divergence between *Four Winds* and *O'Neill*, surely the Board would have said so (since it is at least a superficially plausible distinction) and thereby have cleared up the muddle; as it is, there is no mention made of *O'Neill* in *Four Winds*.[143]

As discretion is the better part of valor in law as elsewhere, the specific statements made in *O'Neill* and *Four Winds* should certainly be avoided. The decisions dealing with this question, however, indicate that a statement to the following effect should be allowed: The union will probably demand a certain clause which the employer will oppose but will bargain over in good faith; despite this bargaining, there might be an impasse, a strike, and a replacement of economic strikers. The employer must not emphasize that this is inevitable but may emphasize that it is possible and that although the employer is opposed to the contract provision in question it will bargain in good faith concerning it.[144]

---

[138] 209 N.L.R.B. No. 82, 85 L.R.R.M. at 1490.

[139] 211 N.L.R.B. No. 60, 86 L.R.R.M. at 1454, *citing* Tommy's Spanish Foods, Inc., 187 N.L.R.B. 235, 240 (1972).

[140] 211 N.L.R.B. No. 60, 86 L.R.R.M. at 1454.

[141] *Id.*

[142] 187 N.L.R.B. 235 (1970), *enforced in pertinent part*, 463 F.2d 116 (9th Cir. 1972).

[143] This is perhaps the most intriguing aspect of all. As discussed at note 137 *supra*, the respondent in *Four Winds* no doubt was aware of *O'Neill* and equally doubtless was his reliance thereon in his brief. Further, Chairman Miller, who was with the majority in *O'Neill* and dissented in *Four Winds,* made no mention of *O'Neill* in his dissent. Finally, Members Fanning and Jenkins, who had dissented in *O'Neill,* but not on the issue of the anticipatory refusal to bargain, completely reversed themselves. One would assume they would have attempted to justify their apparent inconsistency.

[144] *See* Adco Advertising, Inc., 206 N.L.R.B. No. 58, 84 L.R.R.M. 1327 (Oct. 19, 1973). *See generally* Premiere Corp., 212 N.L.R.B. No. 37, 87 L.R.R.M. 1406 (June 28, 1974).

G. Misrepresentations

Unlike some other dictates of labor law, the requirements for truth in campaign propaganda are addressed equally to union and employer. The requirements are certainly not rigorous; for it has realistically been accepted that

> absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees.[145]

Thus a certain degree of "puffing" and hyperbole will be allowed since the Board and courts rightfully credit employees with sufficient perspicacity to discount such statements as customary campaign propaganda.[146]

The Board and courts are to an extent committed to "the principle that debate . . . should be uninhibited, robust, and wide-open" in organizational campaigns,[147] although there is also a countervailing rule that both sides should avoid conscious overstatements that might mislead the employees.[148] In *Hollywood Ceramics Co.*,[149] the Board balanced these two principles:

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Several points should be emphasized. The degree of impact is more important than the degree of departure from the truth; even where the inaccuracy is substantial, if the impact is slight the statement will not violate the Act.[150] Whether the opposite is true has not been satisfactorily decided, for those cases dealing with slight misrepresentations generally assume that the resulting impact is small.[151] Certainly it is conceivable that a slight misrepresentation could have a disproportionate and profound effect on an election, and in such case it should be set aside.

---

[145] Hollywood Ceramics Co., 140 N.L.R.B. 221, 223 (1962) (footnote omitted).

[146] *See, e.g.*, Southern Foods, Inc., 171 N.L.R.B. 999 (1968).

[147] Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966), *citing* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[148] NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969).

[149] 140 N.L.R.B. 221, 224 (1962) (footnote omitted).

[150] *See* Missouri Heel Co., 209 N.L.R.B. No. 79, 85 L.R.R.M. 1442 (March 8, 1974).

[151] *See, e.g.*, Russel-Newman Mfg. Co., 158 N.L.R.B. 1260 (1966).

Of course the degree of impact is not easy to determine. It might be assumed that the most reliable determination could be made by asking the employees whether their vote was influenced by the statement at issue. The Fifth Circuit has held that such an inquiry is not necessary, finding that in most cases the facts will speak for themselves.[152] In close cases the facts do not speak for themselves, but a testimonial inquiry would be of doubtful value since (1) an employee can hardly assay the degree to which his vote was influenced by the element of untruth and (2) even were such an evaluation possible, the inquiry would take place months after the election, and the evaluation would thus further be depreciated.

The Board and courts have therefore had to resort to a commonsense approach in determining impact, and the criteria utilized variously include the special knowledge of the speaker,[153] the employees' independent knowledge allowing accurate evaluation of the statement,[154] whether the employees attempted to determine the statement's accuracy,[155] the form of the statement, and whether the statement was "so extreme as to put the employees on notice of its lack of truth . . . ."[156]

An excellent case illustrating the use of impact evaluation is *NLRB v. A.G. Pollard Co.*[157] Here a union official told employees (1) that if the union lost the employer would probably fire a number of union adherents and (2) that at another plant operated by the employer union adherents had been fired. Both statements were false. The First Circuit held that the impact of the first statement was insignificant since the employees probably would regard it merely as "uninformed prognostication."[158] On the other hand, since the employees knew that the union official had special knowledge of the occurrences at the other plant, they would probably credit the latter statement as accurate and might thereby be influenced to vote in favor of the union to avoid being discharged.

The misrepresentation need not be deliberate in order to violate the Act since "[t]hose who make representations intending them to be relied upon . . . should first ascertain the truth of what they represent, or else suffer the consequences."[159]

---

[152] Tyler Pipe Indus., Inc. v. NLRB, 447 F.2d 1136, 1142 (5th Cir. 1971).

[153] United States Gypsum Co., 130 N.L.R.B. 901, 905 (1961), *citing* Celanese Corp., 121 N.L.R.B. 303 (1958).

[154] NLRB v. A.G. Pollard Co., 393 F.2d 239, 242 (1st Cir. 1968).

[155] York Furniture Corp., 170 N.L.R.B. 1487 (1968).

[156] Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962).

[157] 393 F.2d 239 (1st Cir. 1968).

[158] *Id.* at 242.

[159] Georgetown Dress Corp., 201 N.L.R.B. 102, 116 (1973).

There is little problem with the consideration of opportunity to refute the misrepresentation. If the opposing party does not have ample opportunity to make the refutation, an objection to the misrepresentation will be sustained.[160] If there is an opportunity to rebut and such rebuttal is not made, the election will not be set aside.[161] In *Tyler Pipe and Foundry Co. v. NLRB*[162] the Fifth Circuit, in dictum, cast some doubt on its acceptance of this latter rule, stating that the crucial question is whether employees have been prevented from expressing their uninhibited desires and that it is irrelevant that there was an opportunity to rebut the misrepresentation and such rebuttal was not made. The case was remanded to the Board for a finding as to the impact of the misrepresentations. The Board again sustained the election, finding insignificant impact.[163] The court of appeals again denied enforcement but ignored the earlier language concerning opportunity to rebut.[164] Indeed, the Fifth Circuit has impliedly recanted the language and returned to the fold.[165] Nor has the Board seen fit to follow the Fifth Circuit's suggestion in the first *Tyler Pipe* case; only one decision has suggested that opportunity to rebut should be an irrelevant consideration.[166] The dictum in the first *Tyler Pipe* has a certain pragmatic appeal to it; however, it may be the Board fears that unless rebuttal is made mandatory when there is opportunity for it, the opposing party may bypass rebuttal, wait to see who wins the election, and, if the results are unsatisfactory, file objections and have a rerun. This would perhaps be plausible where an employer or union feels fairly certain that the election is going to be lost and that the chance for victory would be improved next time or where the employer simply desires to delay unionization with the hope that the organizing attempt will wither and die. At any rate, let there be no doubt that if there is an opportunity to rebut, the party must do so or forever hold his peace.

Conclusion

The nature and extent of the subject of this article preclude a complete exposition of permissible and impermissible employer speech dur-

---

[160] *See* Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962).

[161] *See* General Elec. Co., 162 N.L.R.B. 912 (1967).

[162] 406 F.2d 1272 (5th Cir. 1969).

[163] 180 N.L.R.B. 880 (1970).

[164] 447 F.2d 1136 (5th Cir. 1971).

[165] *See* NLRB v. Golden Age Beverage Co., 415 F.2d 26, 31 (5th Cir. 1969) (decided shortly after the first *Tyler Pipe;* held opportunity to rebut was significant and if not used election would not be set aside).

[166] Georgetown Dress Corp., 201 N.L.R.B. 102, 116-17 (1973) (adopting Trial Examiner's findings which cited the first *Tyler Pipe*).

ing a union organizational campaign. Many other types and topics of speech must be closely watched lest they constitute objectionable conduct or an unfair labor practice. The seven areas addressed herein may be considered key areas, but one should be aware that of the four types of speech and activity that constitute both objectionable conduct and unfair labor practices—threats, promises, surveillance, and interrogation—only two have been dealt with herein. Further, within the areas discussed, there exists an infinite variety of possible fact situations, and few cases will afford a sufficiently similar situation to warrant absolute reliance thereon.[167]

As a final thought, this suggestion is made: The effectiveness and legality of any employer's campaign depends not on the president or officials of a company, but on the supervisors. Because of their similarity and closeness to the employees, supervisors can be more effective than any other campaign medium. By the same token, they can wreak more legal havoc. For these reasons attorneys and employer officials must work closely with supervisors, telling them both what to say and what not to say and telling them the legal motives behind the instructions.

---

[167] *See* Lev, *Suggestions to Management: The Lockout*, 19 LAB. L.J. 80, 85 (1968): Probably in no other area of the law are decisions of so little precendential effect than in labor. The circumstances, and the issues to which they give rise, are so complex and dissimilar that the factual coincidence necessary to *stare decisis* rarely exists. Prediction is practically impossible. One has to get a feel for the general attitude which prompted the decision and then try to fathom how the attitude will bear on a case yet to be tried.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL of LAW

VOLUME 46 **SUMMER 1975** **NUMBER 3**

EDITORIAL BOARD

Editor-in-Chief
B. Wayne Vance

Assistant Editor
Thomas Cleveland Collier, Jr.

Article Editors
David Bishop Howorth
Leray McNamara

Comment Editors
John Henegan
William Norman Krucks

Research Editors
James Montgomery Hall
David Townes Lail
Hubbard Turner Saunders IV

Note Editors
John David Duffus, Jr.
Wilton Jerome Johnson III

Index and Review Editor
Benjamin E. Griffith

Business Manager
E. Stephen Williams

Associate Editor
Jackson Henderson Ables III

Faculty Advisor
Thomas R. Ethridge

Billups S. Allen
William Riddick Armstrong, Jr.
William Michael Beasley
Si Morgan Bondurant
Kim Turner Chaze
Joe Price Coleman
Thomas Archie Cook
John Henry Crouch
Edward Jones Currie, Jr.
Robert Dudley Davidson
Paul J. Delcambre, Jr.
James O. Dukes
Hiram C. Eastland, Jr.
Charles Michael Ellingburg
Boswell Stevens Hazard
Crane Davis Kipp
Paul R. Lambert
Robert M. Logan, Jr.
Gerald Richard McLemore
Martin C. McWilliams, Jr.
Colmon S. Mitchell
Norman Albert Mott III
William Clartis Murphree
W. McDonald Nichols
Robert H. Pedersen
Benjamin Joseph Piazza, Jr.
Charles M. Powers
Jack Raymond Reed, Jr.
Richard Charlton Roberts III
Stephen W. Rosenblatt
Eugene Clark Rumfelt
Eric Campbell Schweitzer
Douglas Johnston Smith, Jr.
William L. Smith
Charles Edward Sorey II
Glenn Gates Taylor
Francis McRae Turner III
Daniel E. Tyler
Roger F. Wicker
J. Stephen Wright

COMMENTS

MORTGAGES TO SECURE FUTURE ADVANCES: PROBLEMS OF PRIORITY AND THE DOCTRINE OF ECONOMIC NECESSITY

> A rule of law which has a negative impact upon the construction industry can, in bad economic times, have adverse repercussions upon the financial well-being of an area, especially in a period when construction lenders are taking a long hard look at projects.[1]

The purpose of this comment is to provide an overview of the economic ramifications of mortgages to secure future advances. Depending upon the form of such mortgages, the advantages that may be realized by use of a future advance arrangement are attractive in many lending situations. In determining questions of priority between future advances and intervening liens, a court may give controlling effect to the optional or obligatory form of the advance, actual or constructive notice on the part of the intervening lienor or future advance mortgagee, the nature of the intervening lien, or a combination of these factors. Unfortunately, many courts have placed undue emphasis on the distinction between optional and obligatory advances.

Cognizant of the fact that inertia is the easier route for judges, the writers of this comment will attempt to expose and clarify the rationale underlying a court's choice of a particular rule of priority. The optional-obligatory distinction does not sufficiently take into account the lending situation wherein the future advance mortgagee is under economic compulsion, as opposed to a legal obligation, to make advances regardless of whether he has notice of the intervening liens. In this context two special classes of intervening liens will be discussed: federal tax liens and mechanics' and materialmen's liens. Finally, the case law in Mississippi as it pertains to mortgages to secure future advances will be analyzed.

I. Mortgages to Secure Future Advances

In the absence of a statute providing otherwise,[2] the validity of

---

[1] Kratovil & Werner, *Mortgages for Construction and the Lien Priorities Problem—The "Unobligatory" Advance*, 41 Tenn. L. Rev. 311, 321-22 (1974).

[2] *E.g.*, Ga. Code Ann. § 67-102 (1967); Md. Ann. Code art. 66, §§ 2-3 (1972); *see* Blackburn, *Mortgages to Secure Future Advances*, 21 Mo. L. Rev. 209, 215 n.26 (1956); Note, *Mortgages for Future Advances: The Need for Legislation in Wisconsin*, 1965 Wis. L. Rev. 175, 179-80.

mortgages[3] to secure future advances is fully recognized in the United States[4] and England.[5] Depending on the form of such mortgages, several substantial advantages may be realized by both mortgagor and mortgagee through use of a mortgage to secure future advances.

A. Forms of Mortgages to Secure Future Advances

Essential to a full appreciation of these advantages is a general understanding of the basic forms which mortgages to secure future advances assume. First, the mortgage may purport to secure a definite amount of money without mentioning future advances, but only a portion of that amount will be presently transferred. The balance may be advanced in the future pursuant to a separate agreement between the mortgagor and mortgagee.[6] Second, the mortgage may expressly secure obligatory future advances, whereby the mortgagee will have an enforceable contractual obligation to make advances in the future.[7] Third, the mortgage may expressly secure optional future advances whereby the mortgagee in his discretion may make advances to the mortgagor upon request. Such a mortgage may be limited or unlimited.[8] The limited type specifies a maximum limit on the amount of advances to be secured or a limit on the time within which the advances may be made, or both.[9] The unlimited type contains neither of these limitations. Its variations are the well-known, open-end mortgage[10] and the mortgage containing

---

[3] The term "mortgage" will include "deed of trust" for the purposes of this comment.

[4] 1 L. JONES, LAW OF MORTGAGES § 447, at 573 (8th ed. 1928) [hereinafter cited as JONES ON MORTGAGES]; *see* Lawrence v. Tucker, 64 U.S. (23 How.) 14, 27 (1859). *See also* North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950); Chandler v. Cromwell, 101 Miss. 161, 57 So. 554 (1912).

[5] Gordon v. Graham, 2 Eq. Cas. Abr. 598, 7 Vin. Abr. 52, 22 Eng. Rep. 502 (1716); *cf.* Hopkinson v. Rolt, 9 H.L. Cas. 514, 11 Eng. Rep. 829 (1861).

[6] 1 L. JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 96, at 172 (6th ed. 1933) [hereinafter cited as JONES ON CHATTEL MORTGAGES]; G. OSBORNE, MORTGAGES § 116, at 182 (2d ed. 1970); *see* Note, *The Package Mortgage and Optional Future Advances*, 65 HARV. L. REV. 478, 487 (1952); Note, *supra* note 2, at 177. *Compare* Hilliard v. Cagel, 46 Miss. 309 (1872), *with* Campbell Bros. v. Bigham, 149 Miss. 214, 215, 115 So. 395, 396 (1928).

[7] 9 G. THOMPSON, LAW OF REAL PROPERTY § 4748 (1958). *See generally* Simpson v. Simpson, 123 So. 2d 289 (Fla. 2d Dist. Ct. App. 1960), *noted in* 14 ALA. L. REV. 188 (1961) *and* 32 MISS. L.J. 325 (1961). For a good discussion of contractual liability vis-a-vis loss of profits as the touchstone for determining what advances are obligatory, see Note, *Mortgages—Advance Money Provisions—Effect on Preferences and Recording Acts*, 29 N.Y.U.L. REV. 733, 734 (1954).

[8] Blackburn, *supra* note 2, at 214-15; *see, e.g.*, Chandler v. Cromwell, 101 Miss. 161, 57 So. 554 (1912); 1 JONES ON CHATTEL MORTGAGES, *supra* note 6, § 95, at 171.

[9] Blackburn, *supra* note 2, at 214; Note, *The Package Mortgage, supra* note 6, at 487.

[10] An open end mortgage is, in effect, a revolving loan. It usually provides that after the mortgagor has repaid a stated amount of principal, the mortgagee

a "dragnet" or "anaconda" clause.[11] Fourth, the mortgage may expressly secure optional future advances whereby the mortgagee may make advances as he deems necessary to protect his interest or to preserve the value of the security without the consent of the mortgagor.[12] With respect to the validity of these four forms of mortgages to secure future advances, no distinction need be made between the title theory, lien theory, or intermediate theory of mortgages,[13] nor between real property mortgages and security interests in personalty.[14]

B. Advantages of Mortgages to Secure Future Advances

The most attractive feature, to the mortgagor, of a mortgage to secure future advances is that he can avoid paying interest on the entire debt since interest is payable only on the amount actually received.[15] Consequently, the mortgagor is relieved of the burden of properly investing the surplus until he actually needs it.[16] Furthermore, he is not saddled with heavy finance charges such as are encountered in purchases on an installment basis.[17] Both the mortgagor and mortgagee avoid the inconvenience, and the mortgagor avoids the cost of refinancing the mortgage to include requisite additional sums.[18] Besides saving related

---

may readvance that amount to the mortgagor. This process may be repeated indefinitely in accordance with the terms of the open end mortgage . . . .

E. BISKIND & C. BARASCH, LAW OF REAL ESTATE BROKERS § 25.07[9], at 88 (1969) (footnote omitted).

[11] 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 35.2, at 918 (1965); G. OSBORNE, *supra* note 6, § 116, at 182; *see, e.g.*, Berger v. Fuller, 180 Ark. 372, 21 S.W.2d 419 (1929); Newton County Bank v. Jones, 299 So. 2d 215 (Miss. 1974), *noted in* 46 MISS. L.J. 169 (1975); Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 67 So. 2d 714 (1953). *See generally* Blackburn, *supra* note 2, at 212; Note, *Refinements in Additional Advance Financing: The "Open End" Mortgage*, 38 MINN. L. REV. 507 (1954). Dragnet and anaconda clauses will be viewed in this comment as synonymous.

[12] 9 G. THOMPSON, *supra* note 7, § 4748, at 400-01.

[13] 2 G. GLENN, MORTGAGES § 399, at 1603-04 (1943); G. OSBORNE, *supra* note 6, § 114, at 180.

[14] 2 GILMORE, *supra* note 11, § 35.1, at 916 n.1, § 35.3, at 922. These four forms are not mutually exclusive; moreover, a mortgage to secure future advances may, to an extent, evidence characteristics of all four forms. Note, *Mortgages Securing Future Advances—A Need for Legislation*, 47 IOWA L. REV. 432, 435-36 (1962). A hybrid form of optional future advance mortgage to protect security may be limited to preserving the value of the security and may be functionally obligatory with regard to priority over intervening liens. 9 G. THOMPSON, *supra* note 7, § 4748, at 400-01; Blackburn, *supra* note 2, at 220-21.

[15] *See* G. OSBORNE, *supra* note 6, § 113, at 179; Comment, *Mortgages: Priority of the Real Estate for Present and Optional Future Advances*, 21 OKLA. L. REV. 79 (1968); Note, *Mortgages for Future Advances in Florida*, 15 U. FLA. L. REV. 565 (1963).

[16] G. OSBORNE, *supra* note 6, § 113, at 179.

[17] Note, *supra* note 2, at 176.

[18] G. OSBORNE, *supra* note 6, § 113, at 179; Note, *supra* note 15, at 565.

finance charges and having the opportunity to make long-term repayments,[19] the mortgagor may avoid the expense and inconvenience of executing subsequent mortgages to secure each new advance, escaping the attendant higher interest rates and finance charges.[20] Since the debts of the mortgagor are consolidated, he may enjoy relative freedom from demands of other creditors.[21] The cost to the mortgagor of obtaining money can become a fixed expense since the parties can establish the interest rate far in advance.[22]

The mortgagee, especially with regard to construction loans, has the advantage of paying out the loan piecemeal as the value of the property increases by the construction instead of transferring the full amount of the loan at the outset of the transaction. The mortgagee must thereafter rely solely on the mortgagor's honesty and continued solvency until the proceeds are applied to the property.[23] The mortgagee has the advantage of creating a loan market for the future with persons in whom he has confidence.[24] This close relation between the parties enables the mortgagee to supervise, to an extent, the business operations of the mortgagor and to discourage excessive credit purchases.[25] The mortgage value increases as the value of the security is enhanced so that the mortgagee's equity in the property gives greater personal assurance that the loan will be repaid.[26] In a majority of states, the mortgagee can reduce administrative costs by avoiding the necessity of making new title examinations before each subsequent advance.[27]

II. Problems of Priority

Considerable confusion exists as to the respective rights of mortgagees under mortgages to secure future advances and subsequent lienors whose interests have attached between the time of execution of the mortgage and the making of the advance.[28] Simply stated, the problem

---

[19] Blackburn, *supra* note 2, at 210; Comment, *supra* note 15, at 79.

[20] G. Osborne, *supra* note 6, § 113, at 179; Note, *supra* note 15, at 565. Such a mortgage "makes available additional funds without [the mortgagor] having to execute additional security documents, thereby saving time, travel, loan closing costs, cost of extra legal services, recording fees, et cetera." Newton County Bank v. Jones, 299 So. 2d 215, 218 (Miss. 1974).

[21] Note, *supra* note 2, at 176.

[22] Comment, *supra* note 15, at 79.

[23] G. Osborne, *supra* note 6, § 113, at 179; Note, *supra* note 15, at 565.

[24] Note, *supra* note 2, at 176.

[25] Blackburn, *supra* note 2, at 210; Spradling, *Legal Hazards of Construction Lending*, 19 Bus. Law. 221 (1964).

[26] Blackburn, *supra* note 2, at 210; Note, *supra* note 2, at 176.

[27] G. Osborne, *supra* note 6, § 113, at 179; Note, *supra* note 2, at 176.

[28] *See* 1 C. Wiltsie, Real Property Mortgage Foreclosure § 95, at 177 (5th ed. 1939).

is one of priority which has traditionally been resolved on the basis of the distinction between optional and obligatory future advances.[29]

A. The Optional-Obligatory Distinction

Optional future advances consist of disbursements which (1) the mortgagee may make at his election, with or without the mortgagor's consent;[30] or (2) the mortgagee may decline to make though requested by the mortgagor.[31] Obligatory future advances consist of disbursements which the mortgagee is contractually obligated to make pursuant to the terms of the mortgage.[32] The advances, if obligatory, are secured from the time the mortgage is recorded.[33] The mortgage becomes a prior lien on the property as to all advances made after recordation, regardless of whether intervening liens attached before advances were actually made or whether the mortgagee received notice, actual or constructive, of the intervening liens.[34]

If the advances are optional, the majority of jurisdictions hold that the advances have priority over liens intervening between the execution of the mortgage and the making of the advances, unless the advances were made with actual notice of the intervening lien.[35] A substantial

---

[29] Note, *supra* note 7, at 733. One author has evaluated this distinction by stating, "[It] has little or nothing to recommend it conceptually; it may be helpful, by way of clearing away a little underbush before moving into the forest . . . ." 2 G. GILMORE, *supra* note 11, § 35.4, at 926.

[30] 9 G. THOMPSON, *supra* note 7, § 4748, at 400-01; Blackburn, *supra* note 2, at 221.

[31] *E.g.*, Davis v. Carlisle, 142 F. 106, 108 (8th Cir. 1905); Atkinson v. Foote, 44 Cal. App. 149, 186 P. 831, 836 (Dist. Ct. App. 1919); Hyman v. Hauff, 138 N.Y. 48, 33 N.E. 735, 737 (1893); Hopkinson v. Rolt, 9 H.L. Cas. 514, 11 Eng. Rep. 829, 838 (1861).

[32] 9 G. THOMPSON, *supra* note 7, § 4747, at 398; Note, *supra* note 7, at 734. If the mortgage provides for advances to be made only when certain conditions are fulfilled and the conditions are not fulfilled when advances are made, the advance may be treated as optional. Planters' Lumber Co. v. Griffin Chapel M.E. Church, 157 Miss. 714, 725, 128 So. 76, 78 (1930). Failure to fill in the blanks of an obligatory future advance clause may render the clause inoperative. Lore v. Smith, 161 Miss. 579, 584, 133 So. 214, 215 (1931).

[33] 9 G. THOMPSON, *supra* note 7, § 4747, at 400. It should be noted that mere operation of an *events-of-default* clause in an obligatory future advance mortgage may convert the advances into optional advances. Planters' Lumber Co. v. Griffin Chapel M.E. Church, 157 Miss. 714, 726-27, 128 So. 76, 78-79 (1930); National Bank v. Equity Investors, 81 Wash. 2d 886, 896, 506 P.2d 20, 28 (1973); *accord*, New York & Suburban Fed. Sav. & Loan Ass'n v. Fi-Pen Realty Co., 133 N.Y.S.2d 33 (Sup. Ct. 1954). *But cf.* Hyman v. Hauff, 138 N.Y. 48, 33 N.E. 735, 737 (1893).

[34] 1 JONES ON MORTGAGES, *supra* note 4, § 454, at 587.

[35] Shirras v. Craig, 11 U.S. (7 Cranch) 34, 50 (1812); North v. J.W. McClintock, Inc., 208 Miss. 289, 299, 44 So. 2d 412, 414 (1950); Ackerman v. Hunsicker, 85 N.Y. 43, 47-49 (1881); *cf.* Hopkinson v. Rolt, 9 H.L. Cas. 514, 11 Eng. Rep. 829, 838 (1861). *But see* 2 G. GILMORE, *supra* note 11, § 35.4, at 929, where the writer scoffs at these "mid-nineteenth century landmarks" which should not be taken as representative of "the law" without being heavily discounted for staleness.

minority of jurisdictions hold that constructive notice by recordation of an intervening lien deprives subsequent advances of priority over the intervening lien.[36] A smaller number of jurisdictions hold that the advances enjoy priority over a lien intervening between the execution of the mortgage and the making of the advances, even though the mortgagee had actual notice of the intervening lien.[37] The Vermont doctrine provides that the advances enjoy priority over an intervening lien, even though the mortgagee had actual notice of the intervening lien, unless the intervening lienor actually informs the mortgagee that he will assert his lien priority over any additional future advance.[38]

As a general rule, a mortgagee with a recorded mortgage to secure future advances, whether obligatory or optional, is entitled to priority respecting all advances made before he had notice, actual or constructive, of the attaching of an intervening lien.[39] Conversely, a recorded lien intervening between execution of a mortgage to secure future advances and recordation of such mortgage is entitled to priority over all advances, whether obligatory or optional, made after recordation of the lien.[40]

B. Notice

As previously indicated, the majority of jurisdictions recognizing a distinction between optional and obligatory future advances require actual notice to the mortgagee in order to entitle the intervening lienor to priority over subsequent optional advances.[41] The minority require constructive notice by recordation of the intervening lien.[42] The majority view proceeds on the assumption that by placing the burden upon the intervening lienor to give actual notice to the mortgagee, a lesser burden is placed upon commercial transactions.[43] Since the mortgage represents a potential lien for the amount of optional advances contemplated,[44] and

---

[36] 1 JONES ON MORTGAGES, *supra* note 4, § 456, at 590-91.

[37] *Compare* Witczinski v. Everman, 51 Miss. 841 (1876), *with* North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950). *See also* First Nat'l Bank v. Zarafonetis, 15 S.W.2d 155 (Tex. Civ. App. 1929); Gordon v. Graham, 2 Eg. Cas. Abr. 598, 7 Vin. Abr. 52, 22 Eng. Rep. 502 (1716).

[38] Patch & Co. v. First Nat'l Bank, 90 Vt. 4, 96 A. 423, 424 (1916); McDaniels v. Colvin, 16 Vt. 300, 306 (1844). *See also* Blackburn, *supra* note 2, at 228 n.68.

[39] 1 C. WILTSIE, *supra* note 28, § 254, at 447.

[40] 9 G. THOMPSON, *supra* note 7, § 4748, at 400-01. For a thorough summary of the decisional law in this area, see Annot., 80 A.L.R.2d 179, 211 (1961).

[41] At least one court has sought to ascertain a distinction between actual notice and actual knowledge. Frye v. Bank of Illinois, 11 Ill. 367 (1849).

[42] *See* Annot., 138 A.L.R. 566, 579 (1942).

[43] Comment, *Mortgages to Secure Future Advances*, 34 TUL. L. REV. 800, 803 (1960).

[44] 1 JONES ON MORTGAGES, *supra* note 4, § 456, at 591-92.

since the intervening lienor probably will examine the record as a matter of course before extending credit to the mortgagor,[45] the intervening lienor has actual notice of the extent and purpose of the mortgage.[46] Equity should require the intervening lienor, if he seeks priority over subsequent advances, to make his intention clear to the mortgagee. Assuming that a primary goal in utilizing the mortgage to secure optional advances is to obviate the necessity of examining land records before making each advance, this objective would not be realized if constructive notice sufficed to deprive the mortgagee of priority as to subsequent advances, since the mortgagee would be forced to examine the record for intervening liens.[47]

The minority view, on the other hand, proceeds on the assumption that a mortgage cannot exist until a debt arises.[48] Since recordation of the mortgage to secure optional advances imparts notice only to the extent of advances actually made, each advance is treated as a new mortgage and must be recorded before it is effective against an intervening lienor.[49] A ponderous burden is not imposed on the mortgagee by requiring him to examine the record before making each subsequent advance since the examination is limited to the period following the last advance.[50] Furthermore, any inconvenience or hardship which accrues to the mortgagee in examining the record could have been obviated by an agreement whereby the mortgagee would be contractually obligated to make the future advances.[51] The minority view discourages optional advances by requiring the mortgagee to reexamine the record before making each advance. The majority view limits the intervening lienor's power to upset the mortgagee's priority respecting optional advances by requiring the intervening lienor to give the mortgagee actual notice of the intervening lien, without which the mortgagee is entitled to the protection of the recording acts as to advances made subsequent to recordation of intervening liens.[52]

C. A Hybrid Form of the Optional-Obligatory Distinction

Disregarding considerations of actual or constructive notice, one may surmise that the optional-obligatory distinction is often seized

---

[45] Note, *supra* note 2, at 179.

[46] *Id. But cf.* 1 C. WILTSIE, *supra* note 28, § 254, at 448. *See also* Witczinski v. Everman, 51 Miss. 841 (1876).

[47] Note, *supra* note 2, at 179.

[48] 1 JONES ON MORTGAGES, *supra* note 4, § 456, at 591-92.

[49] *See* Note, *supra* note 2, at 179. *See also* text accompanying notes 35 & 36 *supra*.

[50] Note, *supra* note 2, at 179.

[51] *See* 1 JONES ON MORTGAGES, *supra* note 4, § 456, at 591; *cf.* Ladue v. Detroit & M.R.R., 13 Mich. 380 (1865).

[52] 1 JONES ON MORTGAGES, *supra* note 4, § 456, at 591-92.

upon by the courts as a convenient pretext for adhering to one rule of priority over another.[53] One authority has viewed the distinction as tantamount to "an absence of rule" whereby the courts "are invited to pick and choose, case by case, ad hoc or ad hominem."[54] The gulf between optional and obligatory advances is in fact narrow. As set forth earlier,[55] one of the basic forms of mortgages to secure future advances is the mortgage that expressly secures optional advances limited to preserving the value of the security or to protecting the interest of the mortgagee.[56] Courts have afforded this "hybrid" advance the same priority advantages enjoyed by obligatory advances, reasoning that the mortgagee must make those advances which are necessary to satisfy taxes, municipal liens, insurance premiums, repairs, assessments, replacements, and other charges or liens on the property which would otherwise impair the security in the event the mortgagor failed to satisfy them.[57] The mortgagor suffers no hardship since he has the legal responsibility to satisfy these charges or liens.[58] Even though the mortgagee is not under a contractual obligation to make future advances, a court logically should not treat these advances as purely optional.[59]

The fundamental distinction between future advances that are purely optional and those that are made for the purpose of preserving the value of the security or protecting the mortgagee's interest is that the latter advances are based on economic necessity,[60] while the former are based on mutual consent.[61] For purposes of priority over intervening liens, the purely optional future advance will be denied priority except in the particular circumstances previously discussed.[62] Optional ad-

---

[53] The optional-obligatory distinction has been characterized as merely "a way of avoiding a hard and fast rule in a situation where the equities seem to be in even balance." 2 G. GILMORE, *supra* note 11, § 35.6, at 938.

[54] *Id.* § 35.4, at 930.

[55] See text accompanying note 12 *supra*.

[56] *See generally* 2 G. GILMORE, *supra* note 11, § 35.4, at 929; G. OSBORNE, *supra* note 6, § 118, at 191; Blackburn, *supra* note 2, at 215, 220-21.

[57] Blackburn, *supra* note 2, at 220-21. *Compare* Harper v. Ely, 70 Ill. 581 (1873), *with* Miller v. Ward, 111 Me. 134, 88 A. 400 (1913), *and* MacFarlane v. Thompson, 241 Mass. 486, 135 N.E. 869 (1922).

[58] Blackburn, *supra* note 2, at 221.

[59] Such advances are not truly optional but are, in reality, obligatory. *Id.; cf.* 2 G. GILMORE, *supra* note 11, § 35.4, at 929.

[60] *Cf.* Note, *supra* note 7, at 738.

[61] The mortgagor may request advances, and the mortgagee may decline to make them upon ascertaining the current financial status of the mortgagor. On the other hand, the mortgagee may desire to make advances in order to keep the mortgagor's debt at a profitable level, and the mortgagor may refuse to accept the advances by reason of a corresponding desire to decrease the level of that debt. *See* text accompanying note 8 *supra*.

[62] *See* text accompanying notes 35 through 38 *supra*.

vances that arise from economic necessity may be deemed functionally obligatory for purposes of priority over intervening liens.[63] In this context, one writer has referred to the advances as "obligatory, in the sense that they are necessary to protect previous loans and advances made by the mortgagee."[64] This classification includes advances necessary to prevent the mortgagee from sustaining a loss through insolvency of the mortgagor or to preserve the security of the mortgagee.[65] Advances pursuant to a binding promise, the breach of which possibly would subject the mortgagee to liability for damages, are not included.[66] The mortgage should be drafted carefully to cover such necessary optional advances. Provided the mortgagee does not abuse the privilege of making such advances by attempting to secure coverage which is too broad, the optional future advance that is functionally obligatory should be accorded no lesser status, with respect to intervening liens, than the obligatory advance.[67]

III. The Rationale of Priority Rules

A. Obligatory Future Advances

The rationale underlying each rule of priority as to obligatory and optional future advances reflects varying views of the purpose of recording statutes. With regard to obligatory advances, two legal fictions are used to sustain the view that an examination of the record by the obligatory future advance mortgagee before the making of each advance would be unnecessary. Either the mortgage debt will be deemed in existence from the date of the execution of the mortgage, or the lien arising from advances made under the mortgage may be deemed to relate back to the

---

[63] Note, *supra* note 14, at 448-49. One caveat should be emphasized: If the mortgagee, as a means of protecting his security, retains broad discretionary powers to advance or withhold advances depending upon whether he believes the security is in jeopardy or impending insolvency on the part of the mortgagor will threaten the project's completion or repayment of the loan, some courts may treat the advances as optional rather than obligatory for the purpose of determining priority as between the advances and intervening liens. *See, e.g.*, National Bank v. Equity Investors, 81 Wash. 2d 886, 896, 506 P.2d 20, 28 (1973).

[64] Note, *supra* note 7, at 738. *See generally* Kratovil & Werner, *supra* note 1, at 316-19.

[65] *See* Blackburn, *supra* note 2, at 220-23. *See also* Citizens' Sav. Bank v. Mack, 180 Cal. 246, 180 P. 618 (1919); Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282 (1860).

[66] *See, e.g.*, Westesen v. Olathe State Bank, 75 Colo. 340, 225 P. 837 (1924), *on remand*, 78 Colo. 217, 240 P. 689 (1925) (substantial damages, including amounts for mental suffering and humiliation, awarded for breach of contract to advance money). *But cf.* 2 G. Gilmore, *supra* note 11, § 35.4, at 926 & n.4.

[67] Blackburn, *supra* note 2, at 223.

date of execution of the mortgage.[68] In either case, the intervening lienor who has record notice of the mortgage cannot claim that he was misled as to the true nature of the transaction.[69] The mortgagee cannot equitably be placed in the dilemma of being contractually bound to make advances while perchance having his security vitiated by receiving notice of an intervening lien.[70] If the mortgagee is bound by his contract with the mortgagor to make advances whether or not he wants to, it is immaterial whether he had actual or constructive notice of an intervening lien at the time of making such advances.[71]

B. Optional Future Advances

1. Actual Notice States

With regard to optional advances in jurisdictions which follow the actual notice rule, the basic rationale underlying the view that an intervening lienor must give actual notice to the optional future advance mortgagee in order to gain priority over advances subsequently made is that the recording statutes operate prospectively and not retrospectively.[72] Mere recordation of the intervening lien should thus impart no notice to the mortgagee, who should not be required to continue examining the record after he has complied with all legal requirements as to his own mortgage.[73] Business convenience and equity seem opposed to a mortgagee losing his security through the mere recordation of an intervening lien;[74] a relatively lesser hardship is imposed upon the intervening lienor by requiring him to give actual notice of his lien to the mortgagee. Since the intervening lienor probably will examine the record before acquiring his lien, he has the ability to ascertain the existence of an established scheme which contemplates future advances. Since such advances are part of the framework of an earlier coordinated plan, the intervening lienor would have record notice that advances either have been or will be made. To allow him to destroy the utility and effective-

---

[68] *See* Comment, *The Open-End Mortgage—Future Advances: A Survey*, 5 DE PAUL L. REV. 76 (1956); Note, *supra* note 14, at 444-45.

[69] *Cf.* 2 G. GILMORE, *supra* note 11, § 35.4, at 927. "The intervening [lienor] has, thus, only his folly to thank for his unfortunate situation: the mortgage was on record and the [lienor] should have understood the relation-back principle." *Id. See generally* Note, *Recording of Instruments Affecting Land in Mississippi*, 17 MISS. L.J. 409 (1946).

[70] *See* Atkinson v. Foote, 44 Cal. App. 149, 186 P. 831, 836 (1919); Note, *supra* note 14, at 445.

[71] *See* 3 G. GLENN, *supra* note 13, § 402.

[72] *See* G. OSBORNE, *supra* note 6, § 119, at 192-93.

[73] *See id.*

[74] *See id.* at 193.

ness of that scheme by mere recordation of his lien would allow retrospective use of the recording statutes.[75]

2. Constructive Notice States

Regarding optional advances in those jurisdictions which follow the constructive notice rule, the underlying rationale is that the recording statutes implicitly intend constructive notice by recordation to be a valid substitute for actual notice.[76] Arguing that greater consistency with the purpose of the recording statutes is attained, proponents of this view contend the mortgage cannot secure optional advances until they actually have been made, since no contractual obligation exists for the mortgagee to make the advances.[77] There being nothing for the mortgage to secure until that time, each new advance will be treated as a separate transaction.[78] Assuming the correctness of the statement that the security for the optional future advance arises only when the mortgagee actually makes the advance, the recording statutes would be operating prospectively and not retrospectively.[79]

IV. The Doctrine of Economic Necessity

A. Judicial Construction

What is the nature of the right given the mortgagee to make optional advances necessary to preserve the security from loss or deterioration? This question arises in relation to the arguably unsound reliance[80] placed on the optional-obligatory distinction as the sole determinant of priority between future advances and intervening liens. To inquire only into the existence vel non of a *contractual obligation* to make advances is insufficient:[81] an analysis must be directed to the legal right or interest enjoyed by the mortgagee.[82] Particularly in the context of construction

---

[75] *See* Note, *supra* note 14, at 448.

[76] *Id.*

[77] *Id. But see* 4 J. Pomeroy, Equity Jurisprudence § 1199, at 594-95 & n.17 (5th ed. S. Symons 1941).

[78] See text accompanying notes 49 & 50 *supra*.

[79] *See* Note, *supra* note 14, at 448.

> The fundamental error of this view . . . consists in its mistaken conception of the nature of a equitable lien, in regarding the lien as arising at and from *the act of making the advance*, instead of from the previous *executory agreement* by which the land was bound as security for the future advances.

4 J. Pomeroy, *supra* note 77, § 1199, at 595 n.17 (emphasis in original).

[80] *See* 2 G. Gilmore, *supra* note 11, § 35.4, at 926, § 35.6, at 938.

[81] *See id.* § 35.6, at 938-39.

[82] *See, e.g.*, First Nat'l Bank v. Zook, 50 N.D. 423, 196 N.W. 507, 510 (1923). *See generally* Note, *supra* note 7, at 739.

mortgages, the right of the mortgagee to make advances for the purpose of completing the work in progress and to be assured that those advances will have priority over intervening liens may be an essential right. This right will be especially important if the mortgagor has abandoned the construction and the mortgagee will otherwise suffer considerable loss by reason of the mortgagor's failure to preserve the security.

If a provision of the mortgage purports to preclude all optional advances independently of the request or consent of the mortgagor, the mortgagee may be placed in a dilemma. Either he may sit idly by while the security deteriorates, his previous advances coming to naught, or he may make advances to preserve the security while assuming the risk of losing priority to intervening liens.[83] If an express provision gives the mortgagee the right to make optional advances without regard to the mortgagor's consent, the mortgagee becomes the holder of a valuable contract interest. This interest should be entitled to no less protection than that given an option to purchase the mortgaged property.[84] If the mortgagee is economically—rather than contractually—bound to make such advances, an intervening lienor should not be permitted to vitiate the mortgagee's contract interest simply because it is an option in form.[85] Conversely, if a provision of the mortgage gives the mortgagee the right to decline to make such advances necessary to preserve the security, the mere existence of this right should not deprive the mortgagee of priority as between those advances and intervening liens.[86]

Courts nevertheless are reluctant to determine such questions of priority on any basis other than whether the advances were optional or obligatory, regardless of the right of the mortgagee to make the advances.[87] Exemplifying this judicial reluctance to give the optional advance to preserve security priority over intervening liens, the court, in *Althouse v. Provident Mutual Building-Loan Association*,[88] refused to classify as obligatory certain advances made "as a necessity to protect the security."[89] The mortgagee had made advances for the completion

---

[83] *See generally* Auburn Ins. Agency, Inc. v. First Nat'l Bank, 263 Ala. 30, 81 So. 2d 600 (1955).

[84] *See* 9 G. THOMPSON, *supra* note 7, § 4748, at 400-01; Note, *supra* note 7, at 739; *cf.* Auburn Ins. Agency, Inc. v. First Nat'l Bank, 263 Ala. 30, 81 So. 2d 600 (1955).

[85] *See* First Nat'l Bank v. Zook, 50 N.D. 423, 196 N.W. 507, 510 (1923); Note, *supra* note 7, at 738. *But cf.* Citizens' Sav. Bank v. Mack, 180 Cal. 246, 180 P. 618, 620 (1919).

[86] *Cf.* Auburn Ins. Agency, Inc. v. First Nat'l Bank, 263 Ala. 30, 81 So. 2d 600, 605 (1955); First Nat'l Bank v. Zook, 50 N.D. 423, 196 N.W. 507, 510 (1923).

[87] *See* 4 J. POMEROY, *supra* note 77, § 1199, at 595 n.19; Note, *supra* note 7, at 739. *But cf.* Cedar v. W.E. Roche Fruit Co., 16 Wash. 2d 652, 656, 134 P.2d 437, 441 (1943) (emphasizing relevance of mortgagee's right to make advances after actual notice of intervening lien).

[88] 59 Cal. App. 31, 209 P. 1018 (Dist. Ct. App. 1922).

[89] 209 P. at 1022.

of a building after abandonment by the owner. Pursuant to a provision in the construction mortgage, the mortgagee had the right to enter and take possession of the premises and to use all available means in his discretion to make the premises productive upon such abandonment. Rejecting the mortgagee's contentions that the mortgagor was obligated to accept the advances as a loan for the protection of the mortgagee and that the mortgagee had made the advances involuntarily, the court said:

> We fail to see how the advancements became obligatory in any sense, except that for its own interest [the mortgagee] may have felt obliged to complete the building, so that the property might be sold to better advantage.[90]

The pivotal consideration underlying the court's decision was that the mortgagee's "refusal to advance money for the completion of the building would not have been the violation of any obligation" imposed on him by the mortgage.[91] Similarly, another court rejected the mortgagee's contention that advances made after abandonment, although optional in form, were in fact obligatory by reason of an alleged duty on the part of the mortgagee to take action "reasonably necessary for the protection of the premises."[92] In refusing to recognize such a duty, the court noted that a failure by the mortgagee to make any further advances under the mortgage after abandonment would have subjected the mortgagee to no liability.[93] Such reasoning is indeed consistent with the basic rationale underlying obligatory advances; namely, that the mortgagee will be subject to contractual liability for failure to make contractually obligatory advances and hence need not concern himself with an examination of the record before making each advance.[94] This reasoning, however, does violence to the theory that the mortgagee holds a valuable contract interest under a mortgage to secure optional future advances without regard to the mortgagor's request or consent.[95] It also precludes drawing any distinction between advances that are "purely optional" and advances economically necessary to preserve the security.[96]

---

[90] *Id. But cf.* Cedar v. W.E. Roche Fruit Co., 16 Wash. 2d 652, 657, 134 P.2d 437, 442 (1943).

[91] 209 P. at 1022.

[92] Elmendorf-Anthony Co. v. Dunn, 10 Wash. 2d 29, 116 P.2d 253, 257 (1941).

[93] 116 P.2d at 258. The decision may be based on the unspoken premise that local tradesmen and materialmen should be protected against large, often out-of-state, lending institutions. Kratovil & Werner, *supra* note 1, at 320-21.

[94] *See* text accompanying notes 7 & 66 *supra*.

[95] *See* text accompanying note 84 *supra*.

[96] One court developed an interesting analogy to "economically necessary" advances, suggesting that loss of profits rather than contractual liability on the part of the mortgagee could be the controlling criterion for determining whether advances are obligatory. Hyman

Representative of a more circumspect and economically realistic approach, the court, in *First National Bank v. Zook*,[97] held that a mortgagee was justified in making an advance which the mortgagor neither requested nor refused. *Zook* did not proceed on the basis of any potential liability to which the mortgagee would be subjected if he failed to make the advances, but on the simple basis that otherwise the mortgagee's "interest, under the mortgage, might be wholly destroyed."[98]

An analogy to the optional future advance, treated as obligatory by reason of economic necessity, may be seen in the "crop cases."[99] In *Hamilton v. Rhodes*,[100] the court held that a mortgagee would be entitled to absolute priority for all future advances necessary to protect his security, growing crops, against destruction or waste.[101] A similar holding treated future advances which were "absolutely necessary for the production of the crop"[102] as obligatory advances, the court noting that if the advances had not been made, "the mortgagee would have received nothing."[103] The Washington Supreme Court, in *Cedar v. W.E. Roche Fruit Co.*,[104] acknowledged that a mortgagee could in fact be obligated to continue making advances for his own security:

> While we do not attempt to say that under the mortgage [the mortgagee] could have been forced by [the mortgagor] to continue to make expenditures, still we believe that the advances and charges made by [the mortgagee] after notice of [the intervening lien] can be said to have been obligatory in the sense that they were necessary to protect the previous . . . advances . . . . [105]

Advances made for the purpose of continuing farming operations, including advances to discharge liens arising from necessary expenses and advances for reasonably necessary operating expenses, have been given priority over intervening liens.[106]

Aside from these "crop cases," the decision in *Rowan v. Sharps'*

---

v. Hauff, 138 N.Y. 48, 33 N.E. 735, 737 (1893); *see* Note, *supra* note 7, at 736. A rule based solely on lost profits, however, would afford little protection to intervening lienors. *Id.* at 737.

[97] 50 N.D. 423, 196 N.W. 507 (1923).

[98] *Id.* at 426, 196 N.W. at 510.

[99] Note, *supra* note 7, at 738.

[100] 72 Ark. 625, 83 S.W. 351 (1904).

[101] *Id.* at 626, 83 S.W. at 352.

[102] Eltopia Fin. Co. v. Colley, 126 Wash. 554, 555, 219 P. 24, 25 (1923).

[103] *Id.*

[104] 16 Wash. 2d 652, 134 P.2d 437 (1943).

[105] *Id.* at 658, 134 P.2d at 443.

[106] Continental Supply Co. v. Marshall, 52 F. Supp. 717, 722 (W.D. Okla. 1943), *rev'd on other grounds*, 152 F.2d 300 (10th Cir. 1945), *cert. denied*, 327 U.S. 803 (1946); *accord* Taylor v. Cornelius, 60 Pa. 187 (1869).

Rifle Manufacturing Co.[107] extended the economic necessity rationale to hold that the necessity for making future advances to protect the security from injury or loss "may be so palpable, that an omission to make them may subject the . . . mortgagee [to liability] for neglect of duty."[108] In raising this spectre of potential tort liability, the *Rowan* court speculated that failure or refusal by a mortgagee to make necessary advances would result in "injury to all parties and interests that would be essentially irreparable."[109] Assuming that the priority of a mortgage to secure future advances depends in part on the character of the liability assumed by the mortgagee,[110] the *Rowan* decision may be construed as supporting the proposition that contractual liability is not the sine qua non for treating advances as obligatory for purposes of priority.[111]

B. Statutory Remedies

Once a court decides to examine the entire factual situation and not to be placated by the convenient fiction of "contractual liability," the path may be cleared for a broader and more practical consideration of future advances made by reason of economic necessity. Implicitly recognizing the need to extend more protection to the future advance mortgagee for those advances which he is, in this context, obligated to make, several state legislatures have enacted provisions[112] which in effect give absolute priority to future advances necessary to protect the security. A general limitation imposed is that the mortgage to secure such advances must be recorded prior to the attaching of intervening liens.[113]

The Maine statute is consistent with the reasoning discussed earlier[114] in relation to the difference between advances which are "purely optional" and those which are reasonably necessary to protect the security. That statute enables a mortgagor to file a record notice limiting the amount of optional advances secured by the mortgage to the amount

---

[107] 29 Conn. 282 (1860).

[108] *Id.* at 323.

[109] *Id.* at 327.

[110] *See, e.g.*, Suburbia Fed. Sav. & Loan Ass'n v. R.V. Centre Corp., 43 Misc. 2d 613, 251 N.Y.S.2d 518 (Sup. Ct. 1964); First Fed. Sav. & Loan Ass'n v. Green-Acres Bldg. Corp., 38 Misc. 2d 149, 236 N.Y.S.2d 1009 (Monroe County Ct. 1963).

[111] The Georgia Legislature specifically has rejected this proposition. GA. CODE ANN. § 67-1316 (1967).

[112] *See, e.g.*, CONN. GEN. STAT. ANN. §§ 49-2 to -3 (1958), *as amended*, (Supp. 1975); GA. CODE ANN. § 67-1317 (1967); ME. REV. STAT. ANN. tit. 9, § 561(1)(f) (Supp. 1975); MD. ANN. CODE art. 66, § 2 (1972).

[113] Statutes cited note 112 *supra*.

[114] See text accompanying notes 56 through 67 *supra*; *cf.* 2 G. GILMORE, *supra* note 11, § 35.4.

already advanced.[115] No such limitation, however, is specifically imposed on advances necessary to protect the security. One may conclude that such advances are given considerably greater protection against arbitrary action by the mortgagor as well as against intervening lienors with actual or constructive notice of the mortgage. The Connecticut statute recognizes the essential right[116] of the mortgagee to make advances for the purpose of completing the construction of a building in progress if the mortgagor defaults.[117] Although requiring that the mortgage contain a provision that it secures advances made to preserve the property or to complete improvements thereon, Georgia extends absolute priority to the future advance mortgagee over intervening liens to the extent of such advances, plus providing that all expenses incident to the collection of the debt so secured and to foreclosure by judicial or private sale will likewise be given such priority.[118] A provision of the Maryland statute, facially referring only to optional advances, provides that such advances will be entitled to absolute priority over intervening liens if used solely for paying the cost of repairs, alterations, or improvements to the property.[119]

The basic principle that advances necessary to preserve the security should be accorded special protection is given limited recognition by one Mississippi statute.[120] The Veteran's Farm and Home Board is authorized under this statute to make advances up to $5,000 "for additional construction, renovation, or improvements to the residence" owned for at least 3 years by a veteran. The Board must hold a first mortgage on the residence, the advances must be "guaranteed by the veterans' administration under the provisions of Title III of the servicemen's readjustment act of 1944," and the advances must be for "such additional construction, renovation or improvements [as] are necessary in order to protect and preserve more adequately the security . . . ."[121]

No judicial decision interpreting this particular statute has been found. The legislature has not expanded the applicability of the protection given to this limited class of advances. To concede that the only way to expand the protection is by legislation "is to put the common

---

[115] ME. REV. STAT. ANN. tit. 9, § 561(1)(f) (Supp. 1975).

[116] *See* text accompanying notes 82 through 86 *supra*.

[117] CONN. GEN. STAT. ANN. § 49-3 (1958), *as amended*, (Supp. 1975).

[118] GA. CODE ANN. § 67-1317 (1967).

[119] MD. CODE ANN. art. 66, § 2 (1972). A comment to *id.* art. 21, § 7-102 (1957), states: "Even if the future advance is voluntary and the mortgagee has received actual notice of intervening liens, the mortgagee is still under economic compulsion . . . to make future advances in order to protect his security . . . ."

[120] MISS. CODE ANN. § 35-7-23 (1972).

[121] *Id.* V.A.-guaranteed loans may be secured by mortgages to secure future advances, subject to certain specific limitations. 38 C.F.R. § 36:4355 (1974).

law in a self-imposed straight jacket"[122] and leads inevitably "to the ultimate codification of all our law for sheer lack of capacity in the courts to adapt the law to the needs of the living present."[123] Indeed, one may conclude that inaction by state legislatures may provide substantial impetus for Congress to expand the scope of such remedial legislation as the National Housing Act.[124] The Act already provides that advances made under a federally insured mortgage may be eligible for insurance if such advances are limited to improvements or repairs which substantially protect or improve the basic utility of the mortgaged property.[125]

V. Special Classes of Intervening Liens

The rules concerning a future advance mortgagee's priority over "intervening liens" are usually stated with little or no attempt to distinguish between the types of liens. An analysis of the relevant case law may reveal that the character of a particular lien has an effect, albeit subterranean, on a court's choice of a rule of priority.[126] Certain classes of intervening liens control this choice and affect the priority status of mortgages to secure future advances. These include federal tax liens and mechanics' and materialmen's liens.

A. Federal Tax Liens

Prior to the Federal Tax Lien Act of 1966[127] confusion existed as to the relative priorities between secured interests in property and federal

---

[122] Fox v. Snow, 6 N.J. 12, 76 A.2d 877, 882 (1950) (Vanderbilt, C.J., dissenting). This judicial reluctance to "draw the line" was pithily chastised in Lavery v. Pursell, 39 Ch. D. 508, 517 (1888):

> Courts of Justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, "This is a horse's tail," at some time.

[123] Fox v. Snow, 6 N.J. 12, 76 A.2d 877, 882 (1950) (Vanderbilt, C.J., dissenting). "The doctrine of *stare decisis* neither renders the courts impotent to correct their past errors nor requires them to adhere blindly to rules that have lost their reason for being." 76 A.2d at 883.

> Unless rules of law are created, revised, or rejected as conditions change and as past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid economic and social change.

Id. at 885.

[124] 12 U.S.C. §§ 1701-50g (1970), *as amended*, 12 U.S.C.A. §§ 1701-50g (Supp. 1975), and (Pamphlet No. 1, 1975).

[125] 12 U.S.C. § 1715p (1970).

[126] 2 G. Gilmore, *supra* note 11, § 35.4, at 930.

[127] Pub. L. No. 89-719, 80 Stat. 1125 (codified in scattered sections of Int. Rev. Code of 1954) [hereinafter cited as Code].

tax liens on that same property.[128] The Act gives the United States a lien "upon all property, and rights to property whether real or personal," of a taxpayer who neglects or refuses to pay an assessed tax.[129] Such a lien relates back to the date of assessment[130] and is effective against holders of other encumbrances once notice of the tax lien is filed in the appropriate office.[131] Until the notice is properly filed the lien is not effective against a judgment creditor, security interest holder,[132] purchaser, or mechanic's lienor.[133]

According to William T. Plumb, Jr.,[134] the 1966 Tax Lien Act was "the first comprehensive revision of the law of federal tax liens in over

---

[128] Beginning with United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950), the United States Supreme Court handed down a series of decisions invoking the "choateness" doctrine, resulting in expansion of priority for federal tax liens at the expense of the security protection afforded the business and banking community. This doctrine was borrowed from insolvency cases interpreting the predecessors of 31 U.S.C. § 191 (1970), and operated to require a competing lien (1) to be specific as to the lienor's identity, the property subject to the lien, and the amount payable to satisfy the lien; and (2) to be perfected and complete. United States v. City of New Britain, 347 U.S. 81, 84-85 (1954). "Choate" is defined as "complete," meaning that "not only must a lien be more than initiated, [but] . . . *all* steps must be taken that will insure that the lien will not be lost." United States v. Cutting & Trimming, Inc., 206 F. Supp. 951, 954 (D. Vt. 1962) (emphasis added).

Creditors not within the statutorily protected group (*see* note 132 and accompanying text *infra*), were unprotected not only against preexisting recorded federal tax liens, but also against federal tax liens arising after the attaching of perfected liens created by state statute. United States v. White Bear Brewing Co., 227 F.2d 359, 369-70 (7th Cir. 1955), *rev'd*, 350 U.S. 1010 (1956). United States v. R.F. Ball Constr. Co., 355 U.S. 587 (1958), extended the use of the choateness doctrine as a device for subordinating liens created by contract between the lienor and the taxpayer.

These rulings prompted a 10-year drive for legislation to remedy the plight of the subordinate lienor. *See* Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 HARV. L. REV. 1369, 1370 (1968); Plumb, *The New Federal Tax Lien Law*, 22 BUS. LAW. 271 (1967).

[129] CODE § 6321.

[130] *Id.* § 6322; *see* notes 68 & 69 and accompanying text *supra*.

[131] CODE §§ 6323(a), (f). The appropriate office is the one office within the state or its political subdivision, as designated by the laws of the state, in which the subject property is located. Whenever the state does not have *one* office designated by law, then the notice is to be filed in the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is located. *See* Proposed Treas. Reg. § 301.6323(f)-1(a)(2), 38 Fed. Reg. 791 (1973).

[132] "Security interest holder" encompasses mortgagees, pledgees, and secured parties under the Uniform Commercial Code.

[133] CODE § 6323(a).

[134] Plumb, a former member of the ABA Special Committee on Federal Liens, has been described as the one individual outside of the Treasury Department who was most instrumental in drafting the Federal Tax Lien Act of 1966. Coogan, *supra* note 128, at 1371.

half a century."[135] That revision made it possible for a mortgagee making advances after the intervention of a federal tax lien to acquire a more advantageous priority position. The fact that the intervening lien is a federal tax lien brings special rules into play in establishing whether the mortgagee can have priority for his future advances.[136]

Plumb indicates that the biggest failure of the pre-1966 law was in the area of future advances and after-acquired property.[137] A mortgagee could not prudently make future advances authorized by the mortgage without first searching for federal tax liens.[138] If the mortgagee was obligated to make such advances and advanced the money as required, even though a federal tax lien had been recorded before the advances were made, his security would be lost to the intervening federal tax lien. The tax lien would be prior, because at the time the tax lien attached, the interest of the mortgagee in the property would be so indefinite as to be inchoate.[139] The inchoateness arose due to uncertainty whether the advances would be fully requested and made.[140]

The 1966 Act substituted the term "security interest holder" for "mortgagee" and "pledgee" as persons protected from unfiled federal tax liens, thereby broadening the protection.[141] "Security interest" is defined as "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability."[142] This definition includes mortgages on realty or personalty as well as all forms of commercial security. A security interest is said to be in existence when "the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and . . . to the extent that . . . the holder has parted with money or money's worth."[143] Therefore, a real estate mortgage "in existence" at the time of the filing of proper notice of a federal tax lien will be prior to that tax lien,[144] but a future advance under the same mortgage, made after filing of notice of a federal tax lien, would not be prior.[145] This is the general rule out of

---

[135] Plumb, *supra* note 128, at 271.

[136] *See* CODE § 6323; Proposed Treas. Reg. §§ 301.6323(a)-(i), 38 Fed. Reg. 782 (1973).

[137] Plumb, *supra* note 128, at 273.

[138] *Id.*

[139] *See* note 128 *supra*.

[140] *See* United States v. Pioneer Am. Ins. Co., 374 U.S. 84, 91 (1963); Rev. Rul. 56-41, 1956-1 CUM. BULL. 562.

[141] *See* CODE § 6323(a).

[142] *Id.* § 6323(h)(1).

[143] *Id.* For the Mississippi law concerning what constitutes a perfected security interest, see Note, *supra* note 69.

[144] H.R. REP. No. 1-84, 89th Cong., 2d Sess. 1, at 35 (1966).

[145] Such an advance would not be "in existence" at the time of the filing of notice of

which the exceptions are carved. Without these exceptions, a future advance authorized in a prior mortgage would be subordinate to a federal tax lien.

All exceptions to the general rule expressed above have two common conditions to be met before a security interest not prior in time to a federal tax lien can qualify for priority. First, a written security agreement must be executed, covering subsequent acquisitions and advancements, prior to the filing of the tax lien notice.[146] Second, the secured interest must be "protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation."[147]

If the lender meets the two above conditions, his advances will be protected to the extent that they are made within 45 days from the date the federal tax lien notice is filed.[148] Should the lender acquire actual notice of the filing during the 45-day period, any advances made before such notice and meeting the other conditions will nevertheless be prior to the tax lien.[149] It is immaterial that the mortgage or agreement is couched in terms of optional future advances. Optional advances hold the same protected status as obligatory advances.[150] This exception is useful because it is broad enough to encompass many types of security interests. The problem with the 45-day exception is that the time limitation is so short that priority is extended only to a fraction of the advances made under the typical construction mortgage securing future advances.

Three categories of security interests afford future advances priority over a previously recorded federal tax lien without regard to notice or knowledge by the secured party: Commercial-transaction financing agreements, obligatory disbursements agreements, and real property construction or improvement financing agreements.[151] These security interests are prior even though they arise after the tax lien filing. Each of these categories are subject to the same conditions precedent of local law priority and a previously written security agreement, as well as some additional qualifications. The commercial-transaction financing agreement and the obligatory disbursement agreement exceptions are both

---

the federal tax lien since there is no parting with "money or money's worth" until the advances actually are made.

[146] *See* CODE §§ 6323(c)(1), (d); Plumb, *supra* note 128, at 274.

[147] CODE §§ 6323(c)(1)(B), (d)(2).

[148] *Id.* § 6323(d). *See also* Proposed Treas. Reg. § 301.6323(d)-1, 38 Fed. Reg. 789 (1973).

[149] CODE § 6323(d).

[150] *Id.*; Proposed Treas. Reg. § 301.6323(d)-1, 38 Fed. Reg. 789 (1973).

[151] CODE § 6323(c).

so restricted as to be of little utility to the future advance mortgagee in the construction field.

The "real property construction or improvement financing agreement" exception[152] to the general priority rule is the major device whereby a future advance mortgagee can obtain priority over a recorded federal tax lien. This section of the Act is Congress' recognition that a construction lender who has already invested in a project often only has one hope of recovery—to finance the project to completion. Such a lender, although perhaps not contractually obligated to continue making disbursements, is at least economically obligated to do so and cannot afford to stop his advancements upon discovery of an intervening lien.[153]

One limitation on this exception is that the security interest must be in "qualified property covered by the terms of a real property construction or improvement financing agreement entered into before the tax lien filing."[154] Knowledge of the lien at the time the advances are made is immaterial.[155] "Qualified property" is defined as including only (1) "the real property with respect to which the construction or improvement has been or is to be made," (2) contract proceeds from a contract to construct or improve real property, and (3) the farm crop raised or harvested or the livestock raised or the property that is subject to a federal tax lien at the time of filing.[156] A real property construction or improvement financing agreement is defined as:

> an agreement to make cash disbursements to finance—(i) the construction or improvement of real property, (ii) a contract to construct or improve real property, or (iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.[157]

The holder of a security interest may be able to assert priority over a recorded federal tax lien for interest, collection expenses, insurance and repair costs on the secured property, and the cost of paying off other liens on the secured property which are prior to a tax lien.[158] To qualify for this priority the security interest held must itself be prior to a recorded federal tax lien.[159]

---

[152] *Id.* § 6323(c)(3). *See also* Proposed Treas. Reg. § 301.6323(c)-2, 38 Fed. Reg. 787 (1973).

[153] Plumb, *supra* note 128, at 276.

[154] Proposed Treas. Reg. § 301.6323(c)-2(a)(2), 38 Fed. Reg. 787 (1973).

[155] *Id.* § 301.6323-2(a).

[156] *Id.* § 301.6323(c)-2(c).

[157] CODE § 6323(c)(3)(A). *See also* Proposed Treas. Reg. § 301.6323(c)-2(b), 38 Fed. Reg. 788 (1973).

[158] CODE § 6323(e).

[159] *Id.*

B. Mechanics' and Materialmen's Liens

Mechanics' and materialmen's liens[160] constitute another class of intervening liens for which the special rules apply in order for a future advance mortgage to have priority.[161] Because mechanics' liens are wholly statutory and the acts creating such liens are highly variegated, in both statutory provision and judicial construction, generalizations are difficult.[162] The best way to gain a general view is to group statutes based on common features of the different acts.

One distinguishing feature of all acts authorizing mechanics' liens is the definition of the type of person to whom coverage can be extended. This feature usually affects determination of the amount covered by the lien. If the ability to obtain a mechanic's lien is limited to persons with whom the property owner deals directly, then the amount of the lien would be the amount still owed under the contract between the mechanic's lienor and the property owner.[163] If persons with whom the owner never had any direct dealings are entitled to obtain a mechanic's lien, the statutes are generally split into two groups. One group allows such individuals a direct right of lien regardless of the lack of privity of contract. Such a lien is measured by the lienor's contribution value.[164] The second and largest group bases all lienors' interests on the contract between the property owner and the general contractor. The extent of

---

[160] Mechanics are those individuals who provide services in the course of making repairs or improvements, or performing basic construction on property so as to enhance its value. Materialmen are those who supply materials under the same conditions. For the purposes of this comment, "mechanics' liens" will be used to describe liens held by both groups.

> [P]ractically every segment composing the construction industry—including contractors, subcontractors, material dealers, laborers, artisans, architects, landscape architects, engineers, surveyors—is granted liens of varying extent under varying conditions for the labor, services, or materials furnished or contracted to be furnished for the particular improvement.

4 AMERICAN LAW OF PROPERTY § 16.106F, at 229 (A.J. Casner ed. 1952), *quoting* Stalling, *Mechanics' Lien Laws as They Exist Today*, 4 F.H.L.B. REV. 232 (1938).

[161] The path of the construction lender who seeks to protect his mortgage against competing priority claims of mechanic's [*sic*] lienors is strewn with legal hurdles. Even when the lender obtains priority at the time his mortgage is recorded, the courts find reasons to erode this protection when the job gets into financial trouble.

Kratovil & Werner, *supra* note 1, at 311.

[162] *See* 4 AMERICAN LAW OF PROPERTY, *supra* note 160, § 16.106F, at 227-28.

[163] *Id.* at 229. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 49-33, -36 (1958); ME. REV. STAT. ANN. tit. 10, § 3251 (1971); WASH. REV. CODE ANN. § 60.04.0.0 (Supp. 1971).

[164] 4 AMERICAN LAW OF PROPERTY, *supra* note 160, § 16.106F, at 229-30. *See, e.g.*, ARK. STAT. ANN. § 51-601 (Supp. 1971); DEL. CODE ANN. tit. 25, §§ 2702-03 (1953); PA. STAT. ANN. tit. 49, §§ 1101, 1301-07, 1407 (1969).

each lien is based on the price of the work to be performed by the lienor under the original contract.[165]

Acts authorizing mechanics' liens differ as to the time of attachment. Time of attaching is often the determining factor of the priority of a mortgage or future advance. A majority of states allow attachment at the commencement of building.[166] Minority rules as to the date of attaching include: (1) The date the lienor begins furnishing materials and/or services,[167] (2) time of filing of a claim for payment,[168] (3) the date of the general contract,[169] and (4) the date of recordation of notice of such a contract.[170]

There are two statutory classifications concerning the property interest to which mechanics' liens will attach.[171] First, the lien attaches to whatever interest the contracting owner has in the property at the time the lien arises. Second, the lien attaches to the improvement itself.[172]

The four most important factors affecting priority between advances made pursuant to a mortgage to secure future advances and a mechanic's lien are: (1) The optional-obligatory advance distinction, (2) the time of the attaching of the mechanic's lien, (3) the time the mortgage was recorded, and (4) notice of the interest of another. Problems of priority cannot be considered effectively without reference to all four factors. These factors interact to create specific rules of priority.

The optional-obligatory distinction operates generally to make obligatory advances prior to an intervening mechanic's lien, subject to a requirement that the mortgage itself be recorded before the mechanic's lien attaches.[173] Obligatory advances made under such a mortgage are

---

[165] 4 AMERICAN LAW OF PROPERTY, *supra* note 160, § 16.106F, at 230. *See, e.g.*, N.H. REV. STAT. ANN. §§ 447:2, :5, :6 (1968); N.Y. LIEN LAW §§ 3-4 (McKinney 1966).

[166] 4 AMERCIAN LAW OF PROPERTY, *supra* note 160, § 16.106F, at 231, *citing* HANDBOOK OF THE COMM'RS ON UNIFORM STATE LAWS 495 (1928). The problem then becomes a matter of determining when a building commences. *See, e.g.*, Lily Flagg Bldg. Supply Co. v. J.M. Medlin & Co., 285 Ala. 402, 232 So. 2d 643, 648 (1970); ALA. CODE tit. 33, § 37 (1958); ARK. STAT. ANN. § 51-601 (1971).

[167] *See, e.g.*, CONN. GEN. STAT. ANN. § 49-33 (1958); DEL. CODE ANN. tit. 25, § 2718 (1953).

[168] *See, e.g.*, N.Y. LIEN LAW § 4 (McKinney 1966).

[169] *See, e.g.*, ILL. ANN. STAT. ch. 82, § 1 (Smith-Hurd 1966).

[170] In Mississippi, mechanics' liens attach

> from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or notice thereof, in the office of the clerk of the chancery court . . . .

MISS. CODE ANN. § 85-7-131 (1972).

[171] *See* 4 AMERICAN LAW OF PROPERTY, *supra* note 160, § 16.106F, at 232.

[172] *Id.*

[173] *See, e.g.*, Central Trust Co. v. Louisville, St. L. & T.R., 70 F. 282, 288 (C.C. Ky.

given priority whether made before or after the mechanic's lien attaches.[174] Notice on the part of the mortgagee as to the existence of the intervening mechanic's lien is immaterial since the mortgagee is contractually bound to make the advance.[175] On the other hand, when the advances are optional and the mortgage is recorded prior to the attaching of the mechanic's lien, most states give the mechanic's lien priority.[176] The reason for this result is the mortgage lien for an optional advance is postponed until the date of the making of the advance.

When dealing with an optional advance, an important determination is whether the mortgagee has notice of the intervening mechanic's lien. If the mortgagee makes an optional advance under a previously recorded mortgage with notice of the mechanic's lien, the mechanic's lien will have priority. Constructive notice deprives the optional advance mortgagee of priority in some jurisdictions while actual notice is necessary in others.[177] Some courts have held that when work on a structure begins before the mortgage is recorded, the mortgagee is put on inquiry as to any inchoate mechanics' liens on the property.[178] Should the mortgagee subsequently advance money at his option, mechanics' liens will have priority, because the mortgagee is charged with notice.

The fact that a mortgagee made optional advances with notice of intervening mechanics' liens does not necessarily deprive the advances of priority. In *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Investment Co.*,[179] the Mississippi Supreme Court held that where money was optionally advanced under a prior recorded mortgage and was actually used to pay for the construction, the advances had priority over the intervening mechanics' liens to the extent that the money advanced was so used.[180]

1895); Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co., 166 Miss. 253, 259, 140 So. 736, 738 (1932).

[174] *See, e.g.*, Hayward Lumber & Inv. Co. v. Naslund, 125 Cal. App. 34, 13 P.2d 775, 778-79 (1932) (mortgage lien attaches when mortgage recorded, regardless of when money is actually advanced).

[175] *See, e.g.*, Hance Hardware Co. v. Denbigh Hall Inc., 17 Del. Ch. 234, 152 A. 130, 132 (1930); Gray v. McClellan, 214 Mass. 92, 100 N.E. 1093, 1094 (1913) (dictum).

[176] *See, e.g.*, Community Lumber Co. v. California Publishing Co., 215 Cal. 274, 10 P.2d 60, 61 (1932); Planters' Lumber Co. v. Griffin Chapel M.E. Church, 157 Miss. 719, 724-25, 128 So. 76, 78 (1930).

[177] See notes 35 through 38 and accompanying text *supra*.

[178] *See, e.g.*, Booker & Co. v. Leon H. Watson, Inc., 96 Fla. 671, 123 So. 837, 840 (1928); Winkworth Fuel & Supply Co. v. Bloomsbury Corp., 266 Mich. 298, 253 N.W. 304, 306 (1934).

[179] 166 Miss. 253, 140 So. 736 (1932).

[180] *Id.* at 259-60, 140 So. at 738; *accord*, First Nat'l Bank v. Virden, 208 Miss. 679, 685, 45 So. 2d 268, 270 (1950). *But see* Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), where suit was brought to hold a future

As an element of priority, notice is a two-edged sword. A mortgagee's optional advances may be subordinated if the mortgagee had notice of the mechanic's lien prior to making the advance. On the other hand, if the mechanic's lienor, because of the prior recording of the mortgage, had notice of the existence and extent of the mortgage lien the mechanic's lien may be subordinated.[181]

Time of recording is closely correlated to the optional-obligatory distinction. The basic rules as to priority affected by the time of recording are fairly simple. First, if the mortgage is recorded subsequent to the attaching of a mechanic's lien, the mechanic's lien has priority without regard to whether the advances were optional or obligatory.[182] This rule requires the mortgagee to search the records to assure himself priority. When a mortgage for future advances of the obligatory type is recorded before the attachment of a mechanic's lien, most states give priority to the mortgage lien because the mechanic's lienor has record notice of the mortgage.[183] An 1888 Wisconsin case[184] held that the mortgage became a lien on the subject property from the time of its execution and recording.[185] A few courts have held that, even though the mortgage was recorded prior to the attaching of a mechanic's lien, the mechanic's lien had priority.[186] The mortgage lien attached only when the funds were actually advanced.[187]

As in all states, the mechanic's lien in Mississippi is created and governed by statute.[188] Section 85-7-101 of the 1972 Mississippi Code

---

advance mortgagee liable for the torts of the contractor-mortgagor when the mortgagee had closely supervised application of the advances to be sure they were applied to the construction. The mortgagee was not found to be a joint venturer with the contractor. 447 P.2d at 615, 73 Cal. Rptr. at 375. Still the mortgagee was found to be negligent for failure to exercise reasonable care to prevent the construction of defective homes. 447 P.2d at 617-19, 73 Cal. Rptr. at 377-79. *See generally* Falls Lumber Co. v. Heman, 114 Ohio App. 262, 181 N.E.2d 713 (1961); Pfeiler, *Construction Lending and Products Liability*, 25 BUS. LAW. 1309 (1970).

[181] *See, e.g.*, United States v. Latrobe Constr. Co., 246 F.2d 357 (8th Cir. 1957), *cert. denied*, 355 U.S. 890 (1958); Tapia v. Demartini, 77 Cal. 383, 19 P. 641 (1881); Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co., 166 Miss. 253, 140 So. 736 (1932).

[182] *See, e.g.*, Pittsburgh Plate Glass Co. v. Kransz, 291 Ill. 84, 125 N.E. 730 (1919); Nixon v. Cydon Lodge No. 5, 56 Kan. 298, 43 P. 236 (1896).

[183] *See, e.g.*, Kentucky Lumber & Mill Work Co. v. Kentucky Title Sav. Bank & Trust Co., 184 Ky. 244, 211 S.W. 765 (1919); Waters-Pierce Oil Co. v. United States & Mexican Trust Co., 44 Tex. Civ. App. 397, 99 S.W. 212 (1906); Wisconsin Planing-Mill Co. v. Schuda, 72 Wis. 277, 39 N.W. 558 (1888).

[184] Wisconsin Planing-Mill Co. v. Schuda, 72 Wis. 277, 39 N.W. 558 (1888).

[185] *Id.* at 279, 39 N.W. at 560.

[186] *See, e.g.*, Virgin v. Britton, 80 N.H. 340, 117 A. 14 (1922); Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co., 61 Ohio L. Abs. 477, 101 N.E.2d 408 (Hamilton County C.P. 1950); Pierce v. Mays, 277 S.W.2d 155 (Tex. Civ. App. 1954).

[187] Virgin v. Britton, 80 N.H. 340, 341, 117 A. 14, 15 (1922).

[188] MISS. CODE ANN. §§ 85-7-101, -105, -131 (1972).

creates mechanics' liens on chattels. The lien is limited to persons dealing directly with the property owner. It attaches when the mechanic expends labor or materials to repair or improve the property.[189] The case law interpreting section 85-7-101 indicates that when a mortgage is executed or filed for recording after the attaching of a mechanic's lien, the mechanic's lien is superior.[190] *Billups v. Becker's Welding & Machine Co.*[191] so holds, although mechanics' liens which attach subsequent to the recordation of a mortgage normally are inferior. Where it can be shown that the labor and materials furnished were reasonably necessary to preserve the property from deterioration and to permit its operation, a mechanic's lien on the property will be superior to the mortgage.[192]

Mechanics' liens on realty are controlled by section 85-7-131. This section is not limited to those persons with whom the property owner directly dealt since it creates a lien for all persons who have contributed materials or services to the property improved.[193] The lien takes effect as to intervening lienors "only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or notice thereof, in the office of the clerk of the chancery court . . . ."[194] The *Weiss* case, concerning a lien created by the forerunner of section 85-7-131, held that a mortgage to secure future advances had priority over a perfected intervening mechanic's lien to the extent that the funds advanced were actually used to pay for the construction.[195] When a mechanic's lienor has met the filing requirements, the holder of any subsequently attaching mortgage would have notice, actual or constructive, of the lien or at least notice of facts sufficient to put him on inquiry. *Weiss* constitutes an exception to the above rule.[196] Without notice of the mechanic's lien, the mortgagee obtains a superior

---

[189] *Id.* § 85-7-101.

[190] *See* Buckwalter v. McElroy, 205 Miss. 54, 38 So. 2d 317 (1949).

[191] 186 Miss. 41, 189 So. 526 (1939); *accord*, Mississippi Butane Gas Sys. Co. v. Glissom, 194 Miss. 457, 466, 10 So. 2d 358, 360 (1942) (approving extension of mechanic's lien priority in context of realty).

[192] 186 Miss. at 50, 189 So. at 529. *See also* Commercial Sec. Co. v. Kriner, 53 So. 2d 92 (Miss. 1951); De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936); Moorhead Motor Co. v. H.D. Walker Auto Co., 133 Miss. 63, 97 So. 486 (1923). The burden of proving such allegations lies with the mechanic's lienor. Funchess v. Pennington, 205 Miss. 500, 512, 39 So. 2d 1 (1949).

[193] MISS. CODE ANN. § 85-7-131 (1972).

[194] *Id.*

[195] 166 Miss. at 259-60, 140 So. at 738. *But cf.* Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). *See also* Wortman & Mann, Inc. v. Frierson Bldg. Supply Co., 184 So. 2d 857 (Miss. 1966); First Nat'l Bank v. Virden, 208 Miss. 679, 45 So. 2d 268 (1950).

[196] *See also* Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 150 So. 2d 416 (1963).

lien upon the property.[197] When the advances are obligatory, the mortgage is a prior lien regardless of notice.[198] Also, if the future advance mortgage has been recorded prior to the attaching of any mechanic's lien, then the mechanic's lienor is charged with notice of the prior mortgage, and his lien will be inferior to that of the mortgagee.[199]

VI. Mortgages to Secure Future Advances in Mississippi

The Mississippi Supreme Court formerly refused to recognize the distinction between obligatory and optional future advances.[200] The court held in *Witczinski v. Everman*[201] that a mortgage to secure optional advances was a prior lien on the property as to all advances secured thereby, regardless of whether the advances were made before or after the attaching of intervening liens, or whether the mortgagee had actual or constructive notice of such intervening liens before he made the advances.[202] This result has been criticized on grounds that it hampers marketability and additional mortgage financing.[203] Another criticism is implicit in the rationale underlying this result: By recordation of a mortgage which on its face reveals its extent and purpose, such constructive notice of the contemplated future advances deprives the intervening lienor of *any* right of priority over subsequent advances. By affording optional future advances the same priority over intervening liens as is enjoyed by obligatory future advances, the court precluded the intervening lienor from protecting his interest against future indebtedness incurred by the mortgagor.[204] This liberal rule was later modified to the extent that "purely optional" future advances made by a mortgagee with "actual knowledge" of a lien intervening between the execution of the mortgage and the making of the advances were held to be secondary to the intervening lien.[205] The court stressed the fact that the mortgagee was not bound to advance further money.[206]

---

[197] *Id.* at 221-22, 150 So. 2d at 420-21.

[198] *See* Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co., 166 Miss. 253, 260, 140 So. 736, 738 (1932).

[199] *Id.* at 260, 140 So. at 738.

[200] *See* Witczinski v. Everman, 51 Miss. 841 (1876). *See also* Note, *supra* note 69, at 418-20.

[201] 51 Miss. 841 (1876).

[202] *Id.* at 846-47; *accord*, First Nat'l Bank v. Zarafonetis, 15 S.W.2d 155, 158 (Tex. Civ. App. 1929).

[203] *See* G. Osborne, *supra* note 6, § 117, at 190; Blackburn, *supra* note 2, at 229; Note, *Mortgages Securing Future Advances*, 8 Texas L. Rev. 371, 381 (1930); 32 Miss. L.J. 325 (1961).

[204] Blackburn, *supra* note 2, at 229; Note, *supra* note 11, at 518; Note, *supra* note 203, at 381; Comment, *supra* note 43, at 802-03.

[205] North v. J.W. McClintock, Inc., 208 Miss. 289, 298-301, 44 So. 2d 412, 414 (1950); *cf.* 32 Miss. L.J. 325 (1961).

[206] North v. J.W. McClintock, Inc., 208 Miss. 289, 300, 44 So. 2d 412, 414 (1950).

Despite the apparent failure of the Mississippi Supreme Court to distinguish between future advance clauses and "dragnet clauses,"[207] the practicing attorney should realize the advantages and the possible priority problems associated with future advance clauses generally. Although *North v. J.W. McClintock, Inc.*[208] has been the court's only pronouncement in the last 25 years dealing squarely with the problem of priority between a future advance mortgagee and an intervening lienor, the status of the future advance clause is by no means clear. The court's current preoccupation with dragnet clauses should not be construed as a signal for banks, savings and loan associations, and individual lenders to restrict future advance provisions to include only unlimited optional future advances,[209] nor should it be construed as an assurance that the future advance necessary to preserve or protect the security will enjoy absolute priority over intervening liens, regardless of the "optional" or "obligatory" label attached to such an advance.

Benjamin E. Griffith
Crane Davis Kipp

---

[207] *See* Newton County Bank v. Jones, 299 So. 2d 215 (Miss. 1974), *noted in* 46 MISS. L.J. 169 (1975).

> The court in *Newton County Bank* has added more confusion to the issues by failing to distinguish between future advance clauses and dragnet clauses. These two types of future advance provisions are dissimilar in the results which they provoke when used in [mortgages].

46 MISS. L.J. 169, 178 (1975) (footnotes omitted).

[208] 208 Miss. 289, 44 So. 2d 412 (1950).

[209] The Mississippi Law Institute recently sanctioned the following future advance clause:

> [T]his mortgage shall secure the payment of the note or obligation bearing even date herewith, including any and all advancements made by the Mortgagee thereunder, whether as future advancements or otherwise, together with any renewals or extensions of said note.

Hastie, *Advanced Financing Techniques*, in FRONTIERS IN REAL ESTATE 147, 159 (Mississippi Law Institute 1973). Would advances "made by the Mortgagee" pursuant to this provision be treated as purely optional or obligatory for purposes of determining priority between the advances and an intervening lien? If not obligatory, would advances "made by the Mortgagee" *for the purpose of preserving the security* be entitled to priority over an intervening lien of which the mortgagee had actual notice prior to making the advances? The Mississippi Supreme Court has not given an answer to the latter question, and a legislative pronouncement in this area does not appear imminent.

AN ANALYSIS OF MISSISSIPPI'S COOLING-OFF LEGISLATION

During the past decade a majority of states[1] have enacted legislation affording the consumer a cooling-off period:[2] a limited time in which to cancel without cause a home solicitation sale.[3] The purpose of the cooling-off period is to protect consumers from the coercive sales techniques and fraudulent credit practices of some door-to-door salespersons.[4] Mississippi has recently adopted cooling-off legislation giving consumers 3 days in which to cancel a home solicitation sale under certain conditions.[5] This comment will analyze this legislation in the

---

[1] *See, e.g.*, CAL. CIV. CODE §§ 1689.5-.13 (West 1973), *as amended*, (West Supp. 1973); D.C. CODE ANN. § 28-3811(Supp. 1974); ILL. ANN. STAT. ch. 121 ½, § 262B (Smith-Hurd Supp. 1974); N.Y. PERS. PROP. LAW §§ 425-30 (McKinney Supp. 1974).

[2] Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 U.C.L.A.L. REV. 717 (1968).

Historically, "Hawker and Peddler" statutes and "Green River" ordinances were used to regulate door-to-door salesmen. "Hawker and Peddler" statutes imposed licensing or bonding requirements on door-to-door salesmen. "Green River" ordinances made uninvited residential solicitation a nuisance. Note, *Consumer Protection: The Proposed Cooling-Off Period*, 2 VALPARAISO L. REV. 338, 339-40 (1968).

MISS. CODE ANN. § 21-19-35 (1972) imposes a bonding requirement on door-to-door salesmen and prohibits municipalities from declaring them to be a public nuisance.

The Consumer Credit Protection Act, 15 U.S.C. § 1635 (1970), gives the consumer a 3-day cooling-off period for certain home improvement contracts regardless of whether the sale was solicited at home.

[3] Sher, *supra* note 2, at 717. The cooling-off period allows the buyer time to reconsider his purchase after the salesman leaves. Shortly after the sale the buyer may experience a decreased desire to own the goods. This time period is called the "decompression" period. *Id.*

In 1962, the English Committee on Consumer Protection (Molony Committee) originated the idea of a cooling-off period. The committee's recommendations were adopted in the Hire-Purchase Act of 1964 and re-enacted in the Hire-Purchase Act of 1965. In the United States, Pennsylvania and Michigan were the first states to adopt cooling-off laws. These applied only to home improvment transactions. Massachusetts later enacted a more generalized cooling-off provision. Sher, *supra* note 2, at 717-19.

For a 1972 survey of the cooling-off statutes, see Comment, *Home Solicitation Sales—The Legislative Response to a "Cooling-Off" Period*, 24 S.C.L. REV. 880, 886-93 (1972).

For a discussion of arguments against cooling-off statutes, see Sher, *supra* note 2, at 726-28; Comment, *A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract*, 3 PAC. L.J. 633, 640 (1972); Note, *supra* note 2, at 346-48.

[4] *See* Note, *supra* note 2, at 343-45. The tactics used by some door-to-door salesmen are discussed in *Project—The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 895-922 (1969). Factors indicating that door-to-door salesmen may more easily use fraudulent sales practices than other sellers are discussed in Meserve, *The Proposed Federal Door-to-Door Sales Act*, 37 GEO. WASH. L. REV. 1171, 1172-76 (1969). *See* S. REP. No. 1417, 90th Cong., 2d Sess. 1 (1968).

[5] MISS. CODE ANN. §§ 75-66-1 to -11 (Supp. 1974). Mississippi consumers also have a statutory right to cancel automobile sales. *Id.* § 63-19-31 (1972).

light of similar remedial efforts such as the Uniform Consumer Credit Code [UCCC] and will suggest the adoption of various interpretations and recommend amendments to the Mississippi Act.

I. SECTION 75-66-1: DEFINITIONS

A. Consumer Credit Sale

Under Mississippi legislation, the consumer's right to cancel applies only to those home solicitation sales that are consumer credit sales. A consumer credit sale has been given its own statutory definition and should be discussed before examining the meaning of home solicitation sale.

A consumer credit sale

> is a sale of goods or services in which: (a) credit is granted by a person who regularly engages as a seller in credit transactions of the same kind; (b) the buyer is a person other than an organization; (c) the goods or services are purchased primarily for a personal, family or household purpose; and (d) either the debt is payable in installments or a credit service charge is made.[6]

The Act does not define a sale of goods or a sale of services.[7] Thus a problem may arise where the seller does not call the transaction a sale, but terms it a lease.[8] For example, the seller may lease the buyer a stereo for $20 a month with an option to buy it at the end of a year for $200. If this is a true lease rather than a sale, the statutory right to cancel does not apply. This issue has risen under article 9 of the Uniform Commercial Code [UCC], and the courts have devised a test for resolving whether a transaction is a sale or a lease.[9] Hopefully the Mississippi courts will look to these cases for guidance if the issue should arise.

The inclusion of sales of services as well as sales of goods in the Act is appropriate since the use of dishonest or high pressure sales tactics is as great in either type of sale.[10] This inclusion, however, requires the

---

[6] *Id.* § 75-66-1(2) (Supp. 1974).

[7] The UCCC defines both terms. UCCC §§ 2.105(4) (goods), 2.105(5) (services).

[8] The UCCC avoids this problem by defining sale of goods to include a lease of the goods. *Id.* § 2.105(4).

[9] Courts have held that a true lease is indicated by: (1) A contract provision that specifies an option price at approximately the market value when the lessee exercises the option; (2) the rental charges show an intention to compensate the lessor for the loss of value over the term of the lease due to age and wear; (3) nonexcessive rental payments and an option price that is not too low; and (4) facts which show that the lessee is acquiring no equity in the leased property during the time of the lease. *In re* Alpha Creamery, 4 UCC REP. SERV. 794, 798 (W.D. Mich. 1967)(referee's decision).

[10] Sher, *supra* note 2, at 740.

rights of the parties to be defined when there is partial performance of the services before the buyer cancels.[11]

As stated above, credit must be "granted by a person who regularly engages as a seller in credit transactions of the same kind." Thus a right to cancel may not exist where the seller merely assists the buyer in obtaining a loan elsewhere. The Act possibly could be circumvented by a seller who handles the actual sale and credit negotiations but arranges for a finance company to provide the credit and compensate the seller for procuring the customer.[12] In order to prevent this possibility, some states' cooling-off statutes provide that the right to cancel extends to sales where the buyer pays the seller in cash borrowed from a third party with the assistance of the seller.[13] This approach is preferable. Regardless of who extends credit to the buyer, he has incurred a debt for an item that may have been bought only because of the efforts of the door-to-door salesman.

Even if the seller extends the credit, the sale is not a home solicitation sale unless he "regularly engages as a seller in credit transactions of the same kind."[14] One commentator argues that the word "regularly" should not be construed to limit the statute's application to only those sellers extending credit to all customers. The term should also include instances in which credit is provided to all customers in a particular group or to all customers at certain times of the year, such as Christmas.[15]

Also, the buyer must be a person other than an organization.[16] Since there is a trend for consumers to establish buying clubs and cooperatives in order to obtain lower prices through group purchasing,[17] these types of consumer associations should insist that credit be extended individually to each member to avoid being classified as an organization under the Mississippi statute.[18]

That the goods or services be purchased "primarily for a personal,

---

[11] *See* MISS. CODE ANN. § 75-66-9(3) (Supp. 1974); text accompanying notes 123 through 135 *infra*.

[12] Comment, *The Right of Rescission and the Home Improvement Industry*, 37 ALBANY L. REV. 247, 257 (1973). Since the buyer pays the seller in cash borrowed from a third party, the sale is not a credit sale, and is therefore excluded from the statute's coverage. MISS. CODE ANN. §§ 75-66-1(2)(a), (d) (Supp. 1974).

[13] *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-5001(1) (Supp. 1974).

[14] MISS. CODE ANN. § 75-66-1(2)(a) (Supp. 1974).

[15] *See* Roisman, *Truth in Lending: Regulation Z—Its Limitations and Applicability*, 37 GEO. WASH. L. REV. 1154, 1158 (1969).

[16] MISS. CODE ANN. § 75-66-1(2)(b) (Supp. 1974).

[17] Roisman, *supra* note 15, at 1159.

[18] *See id.* at 1160.

family or household purpose," is the general test for consumer purpose.[19] Goods or services are not classified according to their intrinsic nature but according to the purpose for which the consumer buys them.[20] The statute is not clear as to the result where a buyer buys goods with the intent to use them for a consumer purpose but, before the 3-day cooling-off period, changes his mind and decides to use them for another purpose. If they are not considered consumer goods the buyer cannot cancel. However, since the statute speaks in terms of primary purpose, the implication is that the goods may be used for more than one purpose and still retain their consumer goods classification.[21]

The final requirement of a consumer credit sale is that the debt be payable in installments or that a credit service charge be made. Thus, cash sales are not within the ambit of the cooling-off statute.[22] The exclusion of cash sales from the coverage of the statute may result in a buyer being unable to cancel a sale induced by selling practices within the purview of the cooling-off statute. The cash-paying buyer, however, is not subject to the same potential injury as the installment purchaser who may pay hidden credit costs or interest rates which greatly increase the ultimate cost of the goods. Additionally, the cash buyer is probably more inclined to contemplate the necessity of the purchase.

The phrase "payable in installments" could mean any sale where the buyer pays part of the purchase price at different times (a down payment and one or more other payments).[23] On the other hand, there is authority for interpreting the term to exclude the single-payment credit sale.[24] The UCCC specifically sets out the number of payments necessary for the sale to come within the meaning of the phrase.[25] One court has held that the purchase price is payable in installments if the

---

[19] Smith, *Consumer Protection in Credit Sales—The 1971 North Carolina Act*, 50 N.C.L. REV. 767, 771 (1972).

[20] "[A] radio is inventory in the hands of a dealer and consumer goods in the hands of a householder." UCC § 9-109, Comment 2.

When a landlord buys furnishings for his apartment to obtain additional rental income, the furnishings are not consumer goods. *In re* Bonnema, 4 UCC REP. SERV. 894 (N.D. Ohio 1967)(referee's decision).

For a discussion of consumer goods, see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-7, at 802-03, § 23-13, at 823-25 (1972) [hereinafter cited as WHITE & SUMMERS].

[21] Under the UCC, when the use is divided between business and consumer purposes, the "principal" intended or actual use governs the classification. WHITE & SUMMERS, *supra* note 20, § 23-13, at 824 n.109.

[22] Some states include cash sales. *E.g.*, CAL. CIV. CODE § 1689.5(a) (West 1973).

[23] Comment, *Arizona's Home Solicitation and Referral Sales Act: An Evaluation and Suggestions for Reform*, 12 ARIZ. L. REV. 803, 808 n.35 (1970).

[24] Sher, *supra* note 2, at 743.

[25] UCCC § 1.301(12).

buyer has the option to do so.[26] The failure of the Mississippi Act to define the term could lead to costly litigation for the consumer.

If the debt is not payable in installments, there must be a credit service charge. The failure of the Mississippi Act to define credit service charge necessitates looking elsewhere. The term has been defined as a cost of credit, a charge for the extension of credit,[27] or the cost for deferring payment.[28] The UCCC definition of credit service charge expands these definitions to include all direct or indirect costs which the buyer must bear.[29] In addition, it is well recognized that a credit service charge can be "buried" in the price of the goods sold.[30] The seller can arbitrarily set his purchase price to include a credit service charge although the sales contract does not mention such a charge.

The question of a "buried" credit service charge becomes important where the sale is not payable in installments. For example, if the buyer is to make only one payment in 30 days and if there is no credit service charge, the buyer does not have a right to cancel. The courts should look closely at the price of the goods to determine if the "buried" credit service charge is present.

The requirement that the debt be payable in installments or a credit service charge be made excludes the purchase of most low-cost goods and services from the statute since they will usually be paid for in cash. This requirement makes it unnecessary for the Mississippi statute to have a minimum price limitation on the sales as some other states do.[31]

B. Home Solicitation Sale

The statutory right to cancel applies only to consumer credit sales of goods or services in which the seller or his agent solicits the sale at the buyer's residence and the buyer's agreement or offer to purchase is given to the seller or his agent at the buyer's residence.[32]

---

[26] DeRouville v. E.F.G. Baby Prods. Co., 69 Misc. 2d 252, 329 N.Y.S.2d 470 (Albany County Ct.), *aff'd per curiam*, 40 App. Div. 2d 736, 336 N.Y.S. 2d 455 (1972), *aff'g* 67 Misc. 2d 508, 324 N.Y.S.2d 109 (Albany City Ct. 1971).

[27] Comment, *The Pennsylvania Goods and Services Installment Sales Act: One Man's Interest, Another Man's Service Charge*, 77 DICK. L. REV. 493, 507 (1973).

[28] *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 366 n.26 (1973).

Where the seller offers discounts for prompt payment of the debt, the seller is actually requiring a greater price for an indebtedness of longer duration, *i.e.*, a finance charge. Comment, *supra* note 12, at 256.

[29] *See* UCCC § 2.109.

[30] *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 366 (1973).

[31] *See, e.g.*, CAL. CIV. CODE § 1689.5(a) (West 1973).

[32] *Compare* MISS. CODE ANN. § 75-66-3 (Supp. 1974)(right to cancel home solicitation sale), *with id.* § 75-66-1(1)(definition of home solicitation sale).

The personal solicitation requirement raises several issues. Is this requirement met where the seller solicits by mail or by phone? Arguably, the cooling-off statute was not designed to cover such solicitations since the seller is not physically present in the buyer's home. It might further be argued that the buyer is less likely to succumb to any high pressure or fraudulent sales techniques when contacted through these channels. However, the exclusion of these types of solicitation from coverage by the statute should not be assumed. Each case should be decided on a case-by-case method as to whether the solicitation was "personal." The UCCC avoids this problem by defining a personal solicitation as a "face to face confrontation" between the buyer and the seller.[33] Regardless of what a personal solicitation is, it must take place at the buyer's residence for the sale to come within the cooling-off statute. Thus, if the solicitation occurs at the seller's place of business and the buyer takes the agreement home to sign, the buyer does not have a statutory right of cancellation.

In addition, the buyer must sign the contract or offer to purchase at his residence. The UCCC notes:

> The phrase 'at a residence' rather than 'in a residence' is used to prevent avoidance of the [statute] by the expedient of having the buyer sign the contract outside of, but in the immediate vicinity of, the home.[34]

Presumably, the Mississippi statute uses the term "at a residence" for the same reason. However, all the seller has to do to avoid the statute is have the buyer sign at some place other than his residence. The seller can personally solicit the buyer at his home and then take the buyer to any other place besides the buyer's home and have the buyer sign the agreement. The buyer could not cancel such an agreement. It has been suggested, however, that any buyer who willingly accompanies the salesman to the seller's place of business does not need the protection of the statute because he has a desire to purchase the goods[35] which was not the result of high pressure sales techniques.[36]

The statute's inclusion of not only the buyer's agreement but also his offer to purchase is desirable since this precludes a seller from avoiding the Act by taking the buyer's offer at his residence and "accepting" it later at another place.[37]

---

[33] UCCC § 2.501, Comment 2.

[34] *Id.*

[35] Sher, *supra* note 2, at 750.

[36] UCCC § 2.501, Comment 3.

[37] Runkel, *Uniform Consumer Credit Code: Effect of the Final Draft on Sales, Remedies, and Secured Transactions*, 48 ORE. L. REV. 141, 161 n.144 (1969).

C. *Exclusions*

Even if the sale meets all the above requirements, the sale does not qualify as a home solicitation sale if

> [it is] pursuant to a preexisting revolving charge account, or a preexisting installment account allowing a series of sales, or a sale [is] made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale, or where the sale is initiated by the buyer, or where the seller is regulated by the Mississippi Public Service Commission.[38]

When the seller or his agent makes the first contact, however, the buyer is not deemed to have initiated any following home solicitation sale.[39] The sale or solicitation of insurance is explicitly excluded from the coverage of the cooling-off statute.[40] In addition, where the seller provides the goods to the buyer in emergency situations, the buyer cannot cancel.[41]

The revolving charge account exclusion and the prior negotiations exclusion are contained in the UCCC.[42] The UCCC rationale for these exclusions is that since the seller has established a prior relation with the buyer, the chance of coercion by the seller is substantially less.[43] Presumably, this is the rationale for the exclusion in the Mississippi statute. The Mississippi statute's addition of preexisting installment accounts is consistent with this reasoning.

The prior negotiations exclusion requires that the negotiations be conducted at the seller's fixed place of business where goods or services are offered or exhibited for sale.[44] It is not clear whether a trade fair set up for a limited time would come within this exclusion. A buyer may discuss the purchase and reach some indefinite agreement with a person at a booth at the trade fair. Subsequently, a salesman could call on the

---

[38] Miss. Code Ann. § 75-66-1(1) (Supp. 1974).

[39] *Id.*

[40] *Id.* § 75-66-11.

[41] *Id.* § 75-66-3(5). The emergency exclusion is discussed in the text accompanying notes 70 through 80 *infra*.

[42] UCCC § 2.501.

[43] *Id.*, Comment 3.

[44] A similar, fixed-location provision of the Arizona cooling-off act was held to be a constitutional classification of door-to-door sellers not operating from a fixed location. The rationale is:

> the inability of management to supervise and control home solicitors operating away from the store, is greater where there is no store or fixed location containing a management motivated to try to supervise the door-to-door activities of its salesmen.

State v. Direct Sellers Ass'n, 108 Ariz. 165, 494 P.2d 361, 364 (1972).

buyer at home where the buyer agrees to purchase the goods and signs the sales contract. Whether or not his sale can be cancelled will depend on the court's interpretation of the term "fixed location."

Unlike the prior negotiations exclusion, the revolving charge account and the installment account are not required to be set up at a fixed business location of the seller. Apparently the revolving charge account or the installment account can be set up by a buyer in his home. Thus, a seller could make a $25 door-to-door sale and allow the buyer to set up an installment account that permits a series of sales to be made on the same account. The next day the seller may return and persuade the buyer to make a $100 purchase on the previously established account. The $100 sale would be pursuant to a preexisting installment account allowing a series of sales, and the buyer could not cancel the sale.[45] The presumed rationale for this exclusion fails when the installment account or the revolving charge account does not have to be set up at the seller's fixed place of business.

These three exclusions, prior negotiations, preexisting revolving charge account, and preexisting installment account, enable the seller to avoid the cooling-off statute by escorting the customers to business establishments where sham revolving charge accounts, installment accounts, or prior negotiations may be established.[46] Thus, sales that are both personally solicited and agreed upon in the home of the buyer may be excluded from coverage of the cooling-off statute.

These exclusions do not seem warranted since they dilute the statute's protection of the poor who, because they are customarily furnished credit by door-to-door salesmen, should be the principal beneficiaries of the statute's protection.[47] It would be naive to conclude that sellers will not manipulate these exclusions to thwart the purpose of the cooling-off statute.

If the buyer initiates the sale, it is not a home solicitation sale. When the seller makes the first contact, however, the buyer has not initiated the sale.[48] This exclusion presents several difficulties in light

---

[45] Even where the revolving charge account or installment account is with a seller at a fixed location, the problem of avoidance of the statute still exists. Purchases would not come within the statute if the sales agreements entered into in the home of the buyer are pursuant to a preexisting installment account set up in the store. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[46] Since protection under the Mississippi statute depends on whether the buyer signs in his home, the risk of the seller's avoiding the cooling-off statute exists even without these exclusions. However, it may be easier to get the buyer to go to the store to open an account than it would be to get him to go there to sign papers for a sale. Nevertheless, these exclusions add to the seller's ability to avoid the cooling-off statute.

[47] Buckley, *Recent Consumer Protection Legislation in Ohio*, 22 CLEV. ST. L. REV. 393, 404 (1973).

[48] MISS. CODE ANN. § 75-66-1(1) (Supp. 1974).

of methods used by many door-to-door sellers. Few direct-sales companies rely on "cold canvassing,"[49] using instead more sophisticated marketing methods to reach the potential consumer. These methods usually involve preliminary contact with the potential consumer, directly or indirectly, coupled with a response by the buyer.[50]

One commentator argues against differentiation of seller-initiated contacts from consumer-initiated contacts since no matter who initiates the sale the result is the same. The seller and the buyer are alone at the buyer's home where undue pressure can be exerted against the buyer. In addition he notes that most sellers do not depend entirely on contacts begun by the buyer nor do they rely entirely on cold canvassing; rather they use more sophisticated methods of consumer contact.[51]

For these reasons, the courts should interpret the statute liberally to find that a customer who has responded to an advertisement by the seller has not initiated the sale. The Act does not require "personal" first contact by the seller, only "personal" solicitation. Therefore, as one commentator contends, any type of first contact by the seller, direct or indirect, is sufficient.[52]

The justification for the absolute exclusion of insurance from coverage of the statute[53] is debatable. It appears, however, that the sale of insurance is adequately regulated in Mississippi,[54] and even though there is opportunity for high pressure sales techniques, there is less likelihood of fraudulent or misleading sales tactics.[55]

II. Section 75-66-3: Cancellation

A. Cancellation Period

Except for emergency sales, a buyer has 3 business days, from the time he signs an agreement or offer to purchase, to cancel a home solicitation sale without cause.[56] The 3-day period does not begin to run until the buyer signs an agreement or offer to purchase which complies with

---

[49] Cold canvassing is systematic solicitation of a neighborhood without prior consumer contact. The appeal which the product has to the consumer is determinative of whether the company will use cold canvassing. *Project, supra* note 4, at 898.

[50] For a thorough discussion of the methods used by direct-sales companies, see *id.* at 898-99.

[51] *Id.* at 893 n.12.

[52] Littlefield, *The Home Solicitation Sales Act of 1967*, 42 Conn. B.J. 436, 439 (1968). This would not meet Mississippi's requirement of personal solicitation; but it should at least meet the requirement of first contact by the seller.

[53] Miss. Code Ann. § 75-66-11 (Supp. 1974).

[54] *See id.* §§ 83-1-1 to -43-37 (1972).

[55] *See id.* §§ 83-5-33, -35(a),(b).

[56] *Id.* § 75-66-3(1) (Supp. 1974).

section 75-66-5.[57] The 3-day period ends at midnight of the third business day after the day he signs such an agreement or offer to purchase.[58] The right to cancel is not exclusive; the buyer may still revoke the offer or rescind the contract on legal grounds independent of this statutory right to cancel.[59]

Three business days is sufficient to allow a buyer to consider the wisdom of his purchase. Since "decompression"[60] typically occurs soon after the seller leaves, a prolonged cooling-off period is probably unnecessary.[61] Since the goods need not be delivered nor the services performed in order for the cancellation period to begin, the statute apparently was designed to combat high pressure sales methods rather than buyer dissatisfaction with goods or services.[62]

B. Method of Cancellation

A buyer may cancel a home solicitation sale by notifying the seller in writing at the address provided by the seller.[63] The form of the written notice is unimportant, but it must adequately express the buyer's desire to cancel the sale.[64] While the proper interpretation of what is an indication of a desire not to be bound may certainly result in a legal controversy, the main purpose of the cooling-off statute will be served if this provision is construed liberally.

Although there is no requirement that a notice of cancellation be mailed,[65] the Mississippi statute does provide that if notice of cancellation is by certified or registered mail then it is deemed given when it is deposited in a mailbox with proper address and postage.[66] The statute

---

[57] *Id.*

[58] *Id.*

[59] *Id.* For example, he may revoke his offer before it is accepted or rescind because of fraud, duress, or other causes. *See* UCCC § 2.502, Comment 4.

[60] *See* note 3 *supra*.

[61] Sher, *supra* note 2, at 757-58.

[62] Dissatisfaction with the goods or services themselves can be dealt with under other existing contract and sales remedies. Unfortunately, many consumers do not know of their available remedies, or do not believe the expense of asserting their rights is commensurate with the results.

Ironically, the existence of a cooling-off statute may make it more difficult for a buyer to assert these remedies. Fraud in the factum, one of the real defenses available against a holder in due course, may be harder to establish because the cooling-off period provides the buyer with a reasonable opportunity to obtain knowledge of the terms of the instrument he signed and to cancel if he does not agree to them. Buckley, *supra* note 47, at 404.

[63] MISS. CODE ANN. § 75-66-3(2) (Supp. 1974).

[64] *Id.* § 75-66-3(4).

[65] This interpretation is based on the UCCC. *Compare* UCCC § 2.502(3), *with* MISS. CODE ANN. § 75-66-3(3) (Supp. 1974). *See also* UCCC § 2.502(3), Comment 2.

[66] MISS. CODE ANN. § 75-66-3(3) (Supp. 1974).

does not expressly preclude ordinary mail or personal hand delivery by the buyer to the seller; thus, it is assumed that such methods are permissible under the statute. However, legislative intent appears to imply that certified or registered mail is the preferable method of cancellation.[67] Nonetheless, either legislative amendment or judicial construction of this section may be necessary to alleviate the ambiguity involving the validity of cancellation methods other than certified or registered mail.

The use of certified or registered mail avoids problems in proving when cancellation occurred and eliminates the risk of the seller not receiving notice.[68] In turn, this procedure prevents the seller's forfeiture of the goods under section 75-66-9(1) due to a cancellation lost in the mails.

But certified or registered mail adds a technical burden which may inhibit cancellation. Many consumers may not know what registered or certified mail is. Even if they do know, they may not have the mobility or time to get to the post office. Therefore, even though the statute does not expressly provide for cancellation by regular mail, the courts should permit this method to protect unknowing consumers.

The requirement that the notice of cancellation be "properly addressed" obviously refers to the seller's address which the seller must provide the buyer.[69] As long as the notice uses the address supplied by the seller, this requirement should be deemed to be met, regardless of whether it is an incorrect or fraudulent address.

C. Emergencies

The buyer cannot cancel if he asks for immediate delivery due to an emergency, and the seller makes a substantial good faith beginning of performance.[70] If the emergency purchase involves goods, the buyer can still cancel if the goods are in substantially the same condition as they were delivered.[71]

An emergency exception to a cooling-off statute first appeared in the Consumer Credit Protection Act.[72] This Act applies to all sales where a security interest in the residence of the buyer is retained. The emer-

---

[67] *See id.* §§ 75-66-3(3), -5(2)(b). The registered or certified mail provision was not in the original bill based on the UCCC. That provision was added by amendment. Telephone interview with State Representative John H. Stennis, sponsor of the bill, Dec. 23, 1974.

[68] Comment, *supra* note 23, at 814-15.

[69] MISS. CODE ANN. § 75-66-5 (Supp. 1974).

[70] *Id.* § 75-66-3(5).

[71] *Id.* § 75-66-3(5)(b).

[72] 15 U.S.C. § 1635(d) (1970).

gency exclusion is necessary in such transactions so that a buyer may have expensive emergency home repairs made without paying cash.[73]

The need for an emergency exception in home solicitation sales is questionable. It is difficult to imagine that a door-to-door salesman will have anything to sell for which the buyer will have an emergency need.[74] Additionally, in an emergency, one in need of goods or services seldom waits for someone to call on him. He usually calls someone to come to his home to provide the goods or services. This would be a sale initiated by the buyer and would be excluded from the coverage of the cooling-off statute without need to resort to an emergency provision.[75] However, where an emergency exists and the sale is a home solicitation sale, there is a need for such an exclusion: The seller likely would not perform immediately to meet the emergency if the buyer could cancel the contract the next day.

"Emergency" is not defined by the statute. Apparently the buyer's own belief as to whether an emergency exists is the only criterion.[76] But, where the seller creates the emergency (for example, by disassembling an otherwise operable furnace), it should not be deemed to be an emergency situation within the meaning of the statute.[77]

The good faith-substantial beginning of performance requirement should prevent the seller from procrastinating. A sale can still be cancelled until the time he has met this requirement. This should prevent the seller from waiting until after the 3-day cooling-off period expires before beginning performance.[78]

The statute does not provide a form for the buyer's waiver of his right to cancel. Nor does it require a statement of the nature of the emergency.[79] This is unfortunate; such a statement would be advantageous to both buyer and seller. The statute should indicate whether an oral or a written waiver is necessary. A written waiver, signed and dated

---

[73] Smith, *supra* note 19, at 781.

[74] *Id.* The UCCC, however, lists some "common" examples of goods or services sold in an emergency: emergency repairs to broken water pipes, furnaces, and appliances. UCCC § 2.502, Comment 3.

[75] In times of natural disaster, however, the door-to-door salesman may make the first contact and, therefore, the sale would be a home solicitation sale. If such circumstances justify the emergency provision, the exclusion should be so limited. Smith, *supra* note 19, at 781 n.70.

[76] The UCCC states that the purpose of this subsection "is to protect the seller who in good faith relies on the statement of the buyer that an emergency exists and who performs immediately at the request of the buyer." UCCC § 2.502, Comment 3.

[77] Roisman, *supra* note 15, at 1169.

[78] "Spiking the job" would not be "good faith" performance. *See* note 109 *infra*.

[79] The Consumer Credit Protection Act requires the seller to obtain a written statement signed by the buyer relating the nature of the emergency. *See* Fed. Reserve Bd. Reg. Z, 12 C.F.R. § 226.9(e)(3) (1974).

by the buyer, explaining the nature of the emergency, would be the better approach. In addition, the statute should require that a separate statement be given the buyer by the seller, explaining the impact of the buyer's waiver of the right to cancel. These changes in the statute would make the buyer more cognizant of the effect of his emergency request for goods or services.

Mississippi's statute does not prevent the seller from obtaining the buyer's signature on an emergency waiver as a matter of course. Nor is there any statutory prohibition against any type of waiver of the right to cancel.[80] Unless the emergency exclusion is strictly limited, it may provide a haven of escape for door-to-door sellers wishing to avoid the statute's purpose.

III. Section 75-66-5: Notice to the Buyer

Except in emergency situations, the seller must have the buyer sign "a written agreement or offer to purchase or . . . a statement executed simultaneously with and attached to the written agreement or offer to purchase . . . ."[81] These items must contain the date the buyer signs and a statement of the buyer's right to cancel which complies with either section 75-66-5(2) or section 75-66-5(3).[82] The statement of the buyer's right to cancel must appear under the conspicuous caption, *Buyer's Right to Cancel*, and: (1) Inform the buyer that he can cancel the contract; (2) inform him as to what to say in order to cancel; (3) notify the buyer that he has 3 business days to cancel; (4) contain the seller's name and mailing address; and (5) notify the buyer that the seller may keep a certain amount of the down payment as a cancellation fee.[83]

Until the seller gives the buyer the required notice of the right to cancel, the buyer may cancel by notifying the seller in any manner.[84]

Since the effectiveness of the cooling-off statute depends on whether the buyer learns of the right to cancel in time to exercise it, the provision for giving the buyer such notice is very important.[85] In this

---

[80] Sellers in Arizona use such waivers. Boyd & Balentine, *Arizona's Consumer Legislation: Winning the Battle But . . .*, 14 Ariz. L. Rev. 627, 630 n.29 (1972). The California cooling-off statute deems all waivers of the right to cancel contrary to public policy and void. Cal. Civ. Code § 1689.12 (West 1973).

[81] Miss. Code Ann. § 75-66-5(1) (Supp. 1974).

[82] *Id.*

[83] *Id.* § 75-66-5(2).

[84] *Id.* § 75-66-5(4).

[85] Statutes that provide for disclosure of the buyer's right to cancel are of three types. The first requires the notice to be included in the sales agreement. This type is criticized as the least effective because the buyer is not likely to see the notice. The requirement of boldface type to call the statement to the buyer's attention is inadequate. Mississippi's statute is classed as the first type. The second, more effective type, requires the seller to

vein, the Mississippi statute has several shortcomings. First, having a statement of the buyer's rights appear under the "conspicuous" caption, *Buyer's Right to Cancel*, is insufficient to assure actual notice. This statement can be buried easily in the middle of a lengthy sales contract.[86] Even though the buyer must sign the agreement, there is no assurance that he will understand the right to cancel.[87] This provision should be amended to allow the buyer more opportunity to become aware of this right.[88]

The second criticism of section 75-66-5 is that it does not require the seller to give the buyer a copy of the agreement or offer to purchase containing the buyer's notice of the right to cancel. Since the seller's name and address are contained in this notice, the buyer needs a copy in order to address any notice of cancellation. In addition, a copy of the agreement will remind the buyer that he can think the transaction over and cancel if he wishes. The regulations to the Consumer Credit Protection Act,[89] however, require the seller to deliver a copy of the sales agreement to the buyer in all installment sales.[90] Since the Mississippi cooling-off statute applies only to credit sales, the Consumer Credit Protection Act would apparently require the seller to give the buyer a copy of the sales agreement or offer to purchase.

A third criticism of section 75-66-5 is that the notice of the buyer's right to cancel states that the buyer may cancel by mailing a notice of

---

give the buyer a form separate from the sales contract which advises the buyer of the right to cancel and which may be used by the buyer to cancel the contract. The third and most effective type embodies the English approach. The seller is required to mail the buyer a copy of the sales contract which contains a statement of the buyer's right to cancel. The cooling-off period does not begin to run until the buyer receives this copy of the contract. Sher, *supra* note 2, at 761-62.

[86] Contract disclosure of the buyer's rights may be meaningless for a very large percentage of buyers. *See* Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1320 (1966).

[87] The Consumer's Advisory Council of New York City criticizes UCCC § 2.503 which is almost identical to MISS. CODE ANN. § 75-66-5 (Supp. 1974). The council believes that the notice will not be adequate to inform the uneducated lower class consumer of his rights because he will not be able to understand such phrases as "solicited" and "third business day." Robertson, *Consumer Protections Under the Uniform Credit Code*, 41 MISS. L.J. 36, 61 (1969).

[88] The method adopted by California would more adequately inform the buyer of the right to cancel. On the first page of the sales contract there must appear a notice of the buyer's cancellation rights under the heading, *"Buyer's Right to Cancel"*, which must be in 10-point bold type. CAL. CIV. CODE §§ 1689.7(b), .8 (West 1973). In addition, immediately below the buyer's signature to the sales contract, there must appear a conspicuous statement in 10-point bold type which notifies the buyer of his right to cancel and of the right-to-cancel notice contained in the contract. *Id.* § 1689.7(a).

[89] 15 U.S.C. §§ 1601 *et seq.* (1970).

[90] Fed. Reserve Bd. Reg. Z, 12 C.F.R. §§ 226.7(b), .8(a) (1974).

cancellation by registered or certified mail. Since many consumers are not familiar with certified or registered mail,[91] the procedure should be explained in the notice provision or the notice should contain some statement to the effect that it is different from ordinary mail and that the advice of a postal employee should be sought.

A proper notice provision will inform the buyer of the seller's right to a cancellation fee. In addition the buyer is informed of the maximum amount the seller may keep.[92]

Section 75-66-5(4) sets out the consequences for the seller's failure to comply with the notice requirements: "[T]he buyer may cancel the . . . sale by notifying the seller in any manner and by any means . . . ." The burden is still on the buyer to take affirmative action to cancel the sale, but any action conveying the intent to cancel should be effective.[93] One commentator has suggested that the minimum effect of the seller's failure to comply with the notice provision should be that the agreement is unenforceable.[94] The advantage of this approach is that it relieves the buyer of having to take any action in order to cancel the sale. Mississippi's statute would more effectively stimulate seller compliance with the notice provision if it were amended to make the agreement unenforceable.

Although the buyer must take some action to cancel the sale when the seller fails to comply with the notice provision, the buyer is aided since the 3-day cancellation period does not begin to run until the seller satisfies the requirement.[95] If a seller never complies with section 75-66-5, does the buyer's right to cancel continue indefinitely? There is some authority for an affirmative answer.[96] However, the defense of laches may be available to a seller if the buyer enjoys the benefits of the goods while ignoring available statutory rights.[97]

---

[91] *See* text accompanying notes 63 through 69 *supra*.

[92] MISS. CODE ANN. § 75-66-5(2) (Supp. 1974)(5 percent of the cash price or the down payment, whichever is less).

One criticism of the UCCC is that it fails to do this. *See* UCCC § 2.503(2); Clark, *The Uniform Consumer Credit Code: Assessing Its Impact upon One State and Plugging Its Loopholes*, 18 U. KAN. L. REV. 277 (1970).

[93] Apparently written notice would not be required.

[94] Sher, *supra* note 2, at 780.

[95] MISS. CODE ANN. § 75-66-3(1) (Supp. 1974); UCCC § 2.503, Comment.

[96] Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974). The Fifth Circuit, in construing section 1635 of the Consumer Credit Protection Act, held that it vests a continuing right of rescission in the buyer until 3 days after the creditor complies with the disclosure requirements. *Id.* at 117.

[97] Wachtel v. West, 476 F.2d 1062, 1065 (6th Cir.), *cert. denied*, 414 U.S. 874 (1973).

IV. SECTION 75-66-7: SELLER'S OBLIGATIONS AFTER CANCELLATION

A. Return of Payments and Evidences of Indebtedness

Subject to the seller's right to retain a cancellation fee,[98]

> within ten (10) days after a home solicitation sale has been cancelled . . . the seller must tender to the buyer any payments made . . . and any note or other evidence of indebtedness.[99]

Cancellation by certified or registered mail occurs when it is deposited.[100] The seller will usually have less than 10 days from the receipt of the notice within which to comply.

Although the statute says nothing about the rights of a person to whom a note is negotiated, presumably a holder in due course would be able to maintain an action against a buyer who cancels or a buyer who was never informed of the right to cancel.[101] Nevertheless, holder-in-due-course status will probably be denied if the transferee of the note is associated closely with the business of the seller[102] or had reason to know that the instrument was taken in a door-to-door sale covered by the cooling-off statute.[103] The probable effect of the cooling-off statute will be that transferees will not accept notes from a home solicitation sale until they are at least 3 business days old.

B. Traded-in Goods

If the buyer traded goods[104] as part of the down payment, the goods must be returned to the buyer in substantially the same condition as

---

[98] MISS. CODE ANN. § 75-66-7(3) (Supp. 1974).

[99] *Id.* § 75-66-7(1).

[100] *Id.* §§ 75-66-3(2), (3).

[101] Sher, *supra* note 2, at 777. This result could be avoided by making any instrument taken by a home solicitation seller nonnegotiable. This procedure is logical for two reasons: (1) Financing agencies are more able to tolerate the expense of seller wrongdoing than individual consumers; and (2) it forces financial institutions to screen dealers who attempt to discount notes to the institution. Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 632 (1969). Arizona follows this approach. ARIZ. REV. STAT. ANN. § 44-5005(B) (Supp. 1974). Other states provide that a transferee of a consumer instrument cannot be a holder in due course. *See, e.g.*, MASS. GEN. LAWS ANN., ch. 255, § 12c (Supp. 1975).

[102] Unico v. Owen, 50 N.H. 101, 232 A.2d 405 (1967).

[103] For the appropriate provisions under the UCC, see UCC §§ 1-201(25)(c), 3-302(1)(c), -304(1)(b). *See also* Note, *Consumer Protection—The Holder-In-Due-Course Defense in Consumer Sales*, 73 W. VA. L. REV. 240, 249 (1971).

For a discussion of a financial institution's duty to inquire into the circumstances surrounding the taking of the note, see 45 MISS. L.J. 512 (1974).

[104] Trade-in allowances are more common in sales at retail stores than in door-to-door sales; however, trade-in allowances are sometimes made in the door-to-door sale of items such as vacuum cleaners. Sher, *supra* note 2, at 772 n.254.

when the seller received them.[105] The seller has 10 days after the sale has been cancelled to return the goods.[106] If the seller does not return the goods as provided, the buyer has the option to recover the trade-in allowance.[107] Where the seller returns the goods in worse than original condition, the statute is unclear as to whether the buyer can keep the goods and recover the depreciated amount of their value. One commentator interprets the use of the word "elect" in a similar statute as indicative of legislative intent allowing the buyer to recover the traded-in goods and maintain a suit in conversion if the goods are returned in an impaired condition.[108]

The statute makes no provision for informing the buyer that he has a right to have the traded-in goods returned in substantially the same condition. Rarely will the seller volunteer this information. Notice of this right should be included in the notice to the buyer of the right to cancel.

A problem analagous to that of the seller's returning deteriorated traded-in goods arises in home improvement contracts. Since the seller is not prohibited from performing any services prior to the end of the 3-day cooling-off period, the seller may "spike the job" to keep the buyer from cancelling.[109] If the seller alters the buyer's property prior to cancellation, the seller should be required to restore the property.[110] The effect of this would be that the seller would wait until the cooling-off period had run until beginning the services purchased under the contract.

C. Cancellation Fee

If the buyer exercises his right to cancel, the seller is entitled to a cancellation fee. The amount of the fee is limited to the lesser of the cash

---

[105] MISS. CODE ANN. § 75-66-7(2) (Supp. 1974). Thus, the risk of loss or damage to the traded-in goods rests with the seller.

[106] *Id.* § 75-66-7(1).

[107] *Id.* § 75-66-7(2).

[108] Littlefield, *supra* note 52, at 440, *construing* CONN. GEN. STAT. ANN. § 42-138(b)(Supp. 1974).

[109] An example of spiking the job is when a salesman of housesiding immediately tears off portions of the old siding and replaces it with a few sections of new siding before returning to complete the work. If in the meantime the buyer decides to cancel, he will be hesitant because that would mean he would have to find someone else to finish repairing his home. Meserve, *supra* note 4, at 1186 n.65.

The regulations to the Consumer Credit Protection Act provide that the seller may not make any physical changes in the buyer's property until the cooling-off period has ended and the seller is satisfied that the buyer has not rescinded the contract. Fed. Reserve Bd. Reg. Z, 12 C.F.R. § 226.9(c)(1974).

[110] *See, e.g.*, CAL. CIV. CODE § 1689.11(c) (West 1973). The seller is not entitled to payment for any services rendered prior to cancellation except his cancellation fee. MISS. CODE ANN. § 75-66-9(3) (Supp. 1974).

down payment or 5 percent of the cash price.[111] The seller gets no cancellation fee where: (1) The seller does not comply with section 75-66-7 (4);[112] (2) the buyer's obligations under the contract are terminated independently of his right to cancel;[113] or (3) the buyer revokes his offer to purchase before the seller accepts it.[114]

Since the seller's cancellation fee is not to exceed the amount of the cash down payment, if there is no cash down payment there can be no cancellation fee. Thus where the only down payment is goods traded-in, the seller gets no cancellation fee. But where there is a cash down payment, the seller will probably seek as large a fee as the buyer is able to afford. This should have the effect of preventing a buyer from succumbing to the sales pressure of the seller.[115] In addition, limiting the seller to retention of a cancellation fee out of the cash down payment prevents the buyer from having to make an additional payment in order to satisfy the seller's right to compensation upon cancellation.

The seller is entitled to a cancellation fee regardless of whether he has delivered goods or performed services. While the fairness of this has been questioned,[116] it is generally agreed that a cancelled sale will cause the seller to incur some expense. In addition, the fee should deter capricious cancellations.[117]

The statutory provision for the cancellation fee should preclude the seller from setting his own fee. One seller in New York set his own fee of 50 percent of the cash price as liquidated damages in the event the buyer cancelled. The court held that the provision violated the New York statutory requirement of a 5 percent cancellation fee.[118]

D. Buyer's Lien

Until the seller complies with section 75-66-7,[119] the buyer has a right to maintain possession of and has a lien on any goods delivered by the seller.[120] However, the buyer probably will be unaware of this right

---

[111] MISS. CODE ANN. § 75-66-7(3) (Supp. 1974).

[112] The seller's obligations under this section are to return the buyer's payments or evidences of indebtedness within 10 days of cancellation and to return traded-in goods in "substantially as good condition as when received by the seller." *Id.* §§ 75-66-7(1), (2).

[113] *Id.* § 75-66-3(1).

[114] *Id.* § 75-66-7(3).

[115] UCCC § 2.504, Comment 3.

[116] One commentator argues that unless the seller has performed services or delivered goods he should not be entitled to a cancellation fee. His argument is based upon an analogy to sales at retail stores where buyers are usually allowed to return unused goods without charge. Comment, *supra* note 23, at 825.

[117] Sher, *supra* note 2, at 771. *See* UCCC § 2.504, Comment 3.

[118] Lefkowitz v. E.F.G. Baby Prods. Co., 40 App. Div. 2d 364, 340 N.Y.S.2d 39 (1973).

[119] These requirements are set forth in note 112 *supra*.

[120] MISS. CODE ANN. § 75-66-7(4) (Supp. 1974).

since the statute makes no provision for notification of the right to a lien. Notice of this right should be included in the notice of the right to cancel.[121]

The probable effect of this provision will be that sellers will delay delivery of the goods until several days after the cooling-off period has ended. If the goods have not been delivered, the buyer's remedy against a seller who refuses to return any payments, traded-in goods, or evidences of indebtedness would be a civil action.[122]

V. Section 75-66-9: Buyer Responsibility After Cancellation

A. Return of Delivered Goods

Unless the buyer has a lien on the goods as provided by section 75-66-7(4), the buyer must on demand return any goods within 40 days of cancellation. The buyer's residence is the only required location for the tender. Failure of the seller to demand possession within 40 days of cancellation results in the buyer becoming the owner of the goods without having to pay for them.[123]

Apparently, the purpose of this provision is to protect the buyer from a seller who wishes to impose a sale or an obligation on the buyer by failing to pick up the goods within a reasonable time.[124] However, the provision only requires the seller to "demand" tender, and not to take actual possession within the 40 days. The statute does not state what form the seller's demand must take. Presumably it could be oral. The burden of proof that the demand was made, however, should be on the seller.

The buyer's right to ownership of the goods, if the seller fails to demand tender within the 40 days, is another right of which the buyer may not know. The statute makes no provision for his being made aware of it; therefore, some type of notice of this right should be included in the notice of the right to cancel.[125]

B. Care of the Goods

The buyer must take reasonable care of the goods until 40 days after cancellation. Otherwise, the seller bears the risk of loss during this time.[126] The "reasonable care" provision apparently relieves the buyer

---

[121] The notice provision, section 75-66-5(2), is discussed in the text accompanying notes 81 through 97 *supra*.

[122] Comment, *supra* note 23, at 822.

[123] Miss. Code Ann. § 75-66-9(1) (Supp. 1974).

[124] *See* UCCC § 2.505, Comment 1.

[125] *See* text accompanying notes 81 through 97 *supra*.

[126] Miss. Code Ann. § 75-66-9(2) (Supp. 1974).

of liability for damage to the goods that occurs without his fault.[127] Thus, during the cooling-off period, a buyer may cancel a home solicitation sale after destruction of the goods as long as he took reasonable care of them.[128] However, one commentator interprets the identical provision of the UCCC[129] to mean that the buyer assumes the risk of loss after he receives the goods but upon cancellation or revocation it shifts to the seller.[130] If this latter interpretation is correct, then it was unnecessary for the legislature to define the buyer's duty of care before cancellation.[131]

C. Compensation for Services

Even though the seller performs services prior to cancellation, he gets no compensation except the cancellation fee.[132] Although the statute does not define "services" one must assume that it includes the seller's performance of any acts logically connected with the sale agreement.[133]

The practical effect of this provision may be that sellers will not render any services until the cooling-off period is over.[134] Should it be necessary, because of an emergency, to have the services performed immediately, the buyer can waive his right to cancel.[135] Absent an emergency, there is no harm in the seller waiting 3 days to commence performance of the services.

VI. NONCOMPLIANCE

Most states have criminal penalties for noncompliance by the seller.[136] The Mississippi cooling-off statute does not. Instead there are three provisions which are intended for instances of noncompliance by the seller: (1) Section 75-66-5(4) allows the buyer to cancel "in any manner and by any means" when the seller does not comply with the notice provisions of section 75-66-5; (2) section 75-66-7(4) gives the buyer a lien on the goods when the seller does not comply with section

---

[127] *See* Smith, *supra* note 19, at 783.

[128] *See* UCCC § 2.505, Comment 2.

[129] *Id.* § 2.505(2).

[130] Runkel, *supra* note 37, at 162.

[131] *See* text accompanying note 126 *supra*.

[132] MISS. CODE ANN. § 75-66-9(3) (Supp. 1974).

[133] Comment, *supra* note 23, at 824 n.127.

[134] Sher, *supra* note 2, at 741. *See* text accompanying notes 109 & 110 *supra*.

[135] MISS. CODE ANN. § 75-66-3(5) (Supp. 1974).

[136] *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-5008(c) (Supp. 1974). For a discussion of penalty provisions for the seller's violation of cooling-off statutes, see Sher, *supra* note 2, at 778-83.

75-66-7; and (3) section 75-66-9(1) gives the buyer title to the goods if the seller does not demand tender within 40 days of cancellation. There is no provision, however, for informing the buyer of these rights. This should be included in the notice of the right to cancel.

VII. Constitutionality

The United States Supreme Court has upheld the regulation of door-to-door sales against attacks[137] brought under the due process clause and the commerce clause of the United States Constitution. Restrictions on occupations, when reasonable bases for legislation exists, do not violate the due process clause of the fourteenth amendment.[138] Regulations applying equally to all door-to-door salesmen are not a sufficient burden on interstate commerce to overcome the right of the state to provide for the social welfare of its citizens.[139]

In 1972, the Arizona cooling-off statute was challenged as an arbitrary and unreasonable classification of home solicitation sales as opposed to sales made at retail stores. The Arizona court held that door-to-door selling is a proper subject for separate classification and regulation since certain characteristics unique to door-to-door selling make the consumer more vulnerable than in sales at retail stores. The court also reasoned that since the United States Supreme Court, in *Breard v. Alexandria*,[140] upheld separate classification of door-to-door salesmen for the purpose of prohibiting home solicitation sales, separate classification is valid to regulate such salespersons.[141]

Conclusion

While Mississippi's cooling-off legislation grants increased statutory protection to consumers, three weaknesses exist under the Act. Important phrases, such as "payable in installments," are left undefined. The Mississippi courts could construe these phrases in favor of the consumer, which would be consistent with the Act's purpose. These omissions could as easily be interpreted, however, as a refusal on the part of the legislature to aid consumers beyond the literal language of the Act. A second deficiency is the ambiguity concerning the ways in which consumers may cancel a home solicitation sale. In order to afford

---

[137] *E.g.*, Breard v. Alexandria, 341 U.S. 622 (1951) (door-to-door salesman arrested for violation of city ordinance requiring salesman who solicits at a residence to obtain the owner's prior consent).

[138] *Id.* at 632-33. Protection of the buyer from high pressure sales tactics is a reasonable basis for restrictions which the cooling-off statute imposes on door-to-door salesmen.

[139] *See id.* at 633-41.

[140] 341 U.S. 622 (1951).

[141] State v. Direct Sellers Ass'n, 108 Ariz. 165, 494 P.2d 361, 363-64 (1972).

consumers adequate protection, it is essential that any efforts on the part of the buyer to revoke a home solicitation sale be considered in a light most favorable to the buyer. Finally, the legislation fails to provide an adequate means of informing consumers of all their statutory rights. Legislation requiring written notice to the buyer enumerating all the statutory rights available to consumers under the Act would be one solution to this problem.

The consumer's statutory right to cancel without cause, however, should be an effective deterrent to the use of high pressure sales techniques. Salespersons, knowing that the buyer may cancel the sale after the effect of coercive sales techniques has dissipated, may rely less on such sales methods and more on quality merchandise and good service.

Colmon S. Mitchell

CONTROL OR CARTE BLANCHE? MISSISSIPPI LICENSES CHIROPRACTIC

Daniel David Palmer, grocer and fish peddler, established chiropractic in 1895, in Davenport, Iowa, after allegedly restoring hearing to Harvey Lilland, deaf 17 years, by means of a spinal adjustment.[1] In a second case, Palmer allegedly cured a heart ailment by means of a spinal adjustment.[2] As a result of these two cases, Palmer claimed to have discovered the cause of all disease: nerves impinged by misaligned spinal vertebrae cause disease.[3] Mr. Palmer hypothesized that disease could be cured by adjustment of misaligned vertebrae through the exertion of direct manual pressure, forcing the vertebrae back into place.[4] The same year, D.D. Palmer established the Palmer School to teach his method in a 3-month course.[5] But it was not until his son and disciple, Bartlett Joshua Palmer, took over the school that chiropractic became a nationwide commercial success.[6]

Today, chiropractic is the second largest health-care profession with over 15,000[7] estimated full-time practitioners netting an average of $30,882 annually.[8] Chiropractic is split into two branches: the "straights," or conservative school, represented by the International

---

[1] This story is probably spurious. R. SMITH, AT YOUR OWN RISK, THE CASE AGAINST CHIROPRACTIC 1-4 (1969). Evidently Palmer's lack of a basic science education left him unaware that the acoustic (eighth cranial) nerve does not communicate with the spinal cord. *See* H. GRAY, ANATOMY OF THE HUMAN BODY 903 (1930).

[2] R. SMITH, *supra* note 1, at 3-4.

[3] *Id.* Chiropractors speak alternatively of "misaligned vertebrae" and "subluxations of the vertebrae." A subluxation is an incomplete dislocation or disturbance in the normal alignment of bone ends. Dislocation usually results from trauma, but there are also congenital and pathological dislocations. Traumatic dislocations and subluxations seldom, if ever, occur without simultaneous injury to supporting structures, because a force of between 3,000 and 10,000 pounds, exerted through adjacent soft tissue, would be necessary to separate the vertebrae. Changes in the alignment of vertebrae occur as normal physiological changes consequent to routine living. J. BROOKE, BACK COMPLAINTS AND THE MEDICAL WITNESS 22-25 (1964).

[4] R. SMITH, *supra* note 1, at 5. *See generally* Joyner v. State, 101 Miss. 245, 251, 179 So. 573, 575 (1938); MISS. CODE ANN. § 73-6-1 (Supp. 1974); *Hearings Before the Subcomm. on Frauds and Misrepresentations Affecting the Elderly of the Senate Special Comm. on Aging*, 88th Cong., 2d Sess., pt. 2, at 249 (1964) [hereinafter cited as *1964 Hearings*].

[5] R. SMITH, *supra* note 1, at 5.

[6] *See* Note, *Medical Jurisprudence—Chiropractic—Its Status Under Limited State Licenses,* 34 NOTRE DAME LAW. 562, 567 (1958). "Chiropractic is not a profession but a business. This is evidenced by its historical development." And from a former pupil quoting B. J. Palmer: "There are just two main issues in Chiropractic business—results and health to the patient, and satisfaction in those results and profits to the doctor." P. REMIER, MODERN X-RAY PRACTICE AND CHIROPRACTIC SPINOGRAPHY 46 (1938).

[7] Note, *Malpractice and the Healing Arts—Naturopathy, Osteopathy, Chiropractic,* 9 UTAH L. REV. 705, 714 (1965).

[8] Vogl, *It's Time to Take Chiropractors Seriously,* MED. ECON., Dec. 9, 1974, at 78.

Chiropractic Association, which believes the scope of chiropractic is limited to analysis of spinal subluxation and treatment by manual adjustment of the spine; and the "mixers," or liberal school, represented by the American Chiropractic Association, which has adopted the use of nutritional therapy, physical therapy equipment, vitamins, electricity, water, colonic irrigation, and other "modalities" of therapy, in addition to manipulation of the spine.[9] Chiropractic no longer denies the validity of other health-care systems but argues instead that chiropractic is an effective approach to some, though not all forms of disease, and should be accepted as a supplement to the practice of medicine.[10]

Chiropractic is taught in less than two dozen schools accredited by the National Chiropractic Association.[11] Since 1968, these schools have required 2 years of preprofessional college work including at least 12-30 hours in sciences and 30-48 hours in the humanities. A minimum of 4,200 classroom hours in 4 years is required for a "Doctor of Chiropractic" or "D.C." degree.[12] Chiropractic education is regarded as inadequate to prepare graduates to diagnose disease, let alone treat disease by spinal manipulation.[13] Although basic sciences are taught in chiropractic schools, chiropractic students have no clinical experience with disease to prepare them to recognize it in their practices[14] and are

---

[9] *Id. See also* AMA, Data Sheet on Chiropractic 1 (1968); Note, *supra* note 7, at 713. The "mixer" approach includes the following:

1. Adjustments which correct the "disrelationship" existing in the musculoskeletal system.
2. Nutrition and dietary advice for restoration of chemical balances and correction of malfunctions resulting from an unbalanced diet.
3. Physical therapy with light, heat, etc. for restoration of normal physiological functioning.
4. Counseling to establish balance between mental and physiological factors.

Miss. Legislative Services Office, PROBLEM ONE: THE PROPOSITION OF LICENSING CHIROPRACTORS IN THE STATE OF MISSISSIPPI 4 (Sept. 12, 1972) (footnote omitted) [hereinafter cited as LICENSING PROPOSITION].

[10] *See* Vogl, *supra* note 8, at 78. Acceptance by the medical profession cannot be a serious objective of chiropractic. The official position of both the American Medical Association and the Mississippi State Medical Association is that chiropractic is a cult based on a hypothesis repudiated by the established facts of medical science, and whose practitioners are unqualified and incompetent to diagnose disease. *See Hearings on S. 1710 and S. 2078 Before the Subcomm. on Federal Employers' Compensation of the Senate Comm. on Labor and Public Welfare,* 88th Cong., 2d Sess., at 69 (1964); Lotterhos & Long, *MSMA's Testimony on House Bill 344,* 3 J. MISS. STATE MED. ASS'N 151 (1962).

[11] Note, *supra* note 7, at 714.

[12] COUNCIL ON CHIROPRACTIC EDUCATION, EDUCATIONAL STANDARDS FOR CHIROPRACTIC COLLEGES 5, 15-16 (9th rev. ed. 1970); LICENSING PROPOSITION, *supra* note 9, at 4.

[13] It was not until August 1974 that the Council on Chiropractic Education (jointly representing both national chiropractic associations) was recognized by the U.S. Office of Education as a national accrediting agency for chiropractic schools. Vogl, *supra* note 8, at 83.

[14] Note, *supra* note 7, at 714-15.

not taught a scientific approach to understanding its causes.[15]

Chiropractic theory has never been endorsed by any creditable scientific or medical research,[16] but rather, its obvious fallacies and more subtle hazards have been recognized and divulged by the medical profession, government health committees,[17] and special interest groups.[18] Despite seemingly overwhelming refutation by all competent sources, and without any scientific demonstration of effectiveness, both state and federal legislation have elevated chiropractic to the legal status of a licensed health-care profession.[19] Today, chiropractic is licensed in all 50 states.[20] Chiropractic services are covered by Medicaid,[21] Medicare,[22] workmen's compensation laws in many states,[23] and policies of many private insurance companies;[24] recent acceptance by the United States

---

[15] For this reason, chiropractic education is an utter waste of time and a hoax on chiropractic students who may actually believe they are being prepared to cure disease by spinal manipulation. *See also* WIS. GOVERNOR'S HEALTH PLANNING AND POLICY TASK FORCE, REPORT OF THE CHIROPRACTIC STUDY COMM. 23, 24 (1972) [hereinafter cited as GOVERNOR'S TASK FORCE].

[16] *Cf. id.* at 17-19, 40.

[17] *See 1964 Hearings, supra* note 4, at 233; LICENSING PROPOSITION, *supra* note 9; GOVERNOR'S TASK FORCE, *supra* note 15.

[18] *See, e.g.*, American Public Health Association, Chiropractic and Naturopathy (Nov. 13, 1969); Maisel, *Should Chiropractors Be Paid With Your Tax Dollars?*, READERS DIGEST, July 1971, at 76; *AFL-CIO Fact Sheet on Chiropractic,* 214 J.A.M.A. 1095 (1970) (documenting the opposition of the AFL-CIO to the inclusion of chiropractic in the Medicare program); Senior Citizens News, Jan. 1969, vol. 2, no. 88 (reprint).

[19] There are many explanations for the belief some people have in chiropractic efficacy. Of course credulous or desperate persons are psychologically vulnerable to testimonials to chiropractic. Then too, the treatments themselves, usually involving massage as well as joint popping and spinal manipulation, have inherently beneficial psychological effects, since the patient leaves the chiropractor "feeling good," temporarily. The rapport between chiropractor and patient is the "bed-side manner" at its best. Once the chiropractor has the patient psychologically convinced something is being done to improve his condition, the battle is usually won, since the majority of patient complaints are either psychosomatic, self-limiting, or self-remitting. Persons with psychosomatic complaints may already have been alienated from the medical profession by a lack of interest or attention from a physician with "serious" sickness in his waiting room. Another group who may be alienated are the untreatable minor orthopedic cases, whose physicians may fail to prescribe physical therapy. A further consideration is that the average chiropractic fee for an office visit is less than that charged by a physician. The most serious consequences for a patient substituting a chiropractor for a physician occur in those cases which may become aggravated or irreversible if medical treatment is delayed. *See* GOVERNOR'S TASK FORCE, *supra* note 15, at 39; R. SMITH, *supra* note 1, at 123-41. *See also* Vogl, *supra* note 8, at 76-85.

[20] LICENSING PROPOSITION, *supra* note 9. Louisiana followed Mississippi to become the 50th state licensing chiropractic. LA. REV. STAT. ANN. §§ 2801-18 (West Supp. 1975).

[21] 42 U.S.C. § 1395x(r)(5) (Supp. III, 1973).

[22] *Id.* § 1396d(g).

[23] Vogl, *supra* note 8, at 77.

[24] 10 U. KAN. L. REV. 622, 623 (1962).

Office of Education of a national accrediting agency for chiropractic schools will make qualifying schools eligible for federal grants.[25] In terms of legal status and public image, chiropractic has come a long way.

I. MISSISSIPPI'S CHIROPRACTIC LICENSURE ACT

Mississippi became the 49th state to license the practice of chiropractic when the 1973 legislative session passed the "Chiropractic Licensure Act."[26] With the passage of this law, the medical profession's politically impotent campaign to ban chiropractic as a dangerous "cult" passed into oblivion: chiropractic can no longer be ignored. The approach taken by chiropractic's opponents was to produce a law which would at least upgrade and control chiropractors in order to protect the public.[27] Now that chiropractic is licensed, it is necessary to assess the law by examining its legal and practical effects, conflicts arising under it, and problems of interpretation and enforcement.

Section 73-6-1 defines the practice of chiropractic:

> The practice of chiropractic involves the analysis of any interference with normal nerve transmission and expression, and the procedure preparatory to and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and its immediate articulations for the restoration and maintenance of health without the use of drugs or surgery.[28]

While this definition would seem to limit the practice of chiropractic to the scope of spinal adjustment for impinged nerves and apparently exclude chiropractors from the province of medicine through the phrase "without the use of drugs or surgery," it may actually expand the scope of chiropractic. Certainly more is involved in the practice of medicine than the use of drugs and surgery,[29] and the phrase "for the restoration and maintenance of health" is extremely broad—perhaps broad enough to reach beyond sprains and strains (which are within the province of the medical specialty of orthopedics)[30] to conditions which require early detection and medical treatment to avoid irreversible harm.[31]

---

[25] *See* Vogl, *supra* note 8, at 83.

[26] MISS. CODE ANN. §§ 73-6-1 to -31 (Supp. 1974).

[27] *See, e.g.*, LICENSING PROPOSITION, *supra* note 9.

[28] MISS. CODE ANN. § 73-6-1 (Supp. 1974).

[29] *See id.* § 73-25-33 (1972), which defines the practice of medicine in Mississippi. *See also* Redmond v. State *ex rel.* Attorney-Gen., 152 Miss. 54, 118 So. 360 (1928).

[30] STEADMAN'S MEDICAL DICTIONARY 891 (22d ed. 1973) defines orthopedics as: "[T]he medical specialty concerned with the preservation, restoration, and development of form and function of the extremities, spine, and associated structures by medical, surgical, and physical methods."

[31] A 1963 survey for the American Chiropractic Association indicated that a high

Modern chiropractors profess to have evolved beyond a belief in a single cause of all disease to a recognition of their own limitations.[32] However, neither the Chiropractic Licensure Act nor the rules and regulations adopted by the Mississippi State Board of Chiropractic Examiners[33] compel any chiropractor to refer cases beyond his capability to qualified medical doctors.[34] The wording in the definition, "procedure preparatory to and complementary to the correction thereof," elated the proponents of "wide-scope" chiropractic in the State of Washington, when similar wording was incorporated in their licensure act.[35] A recent decision in the Court of Appeals of the State of Washington interpreting this wording found no difference apparent in the statute between diagnosis and treatment, and held that surgical methods of diagnosis (drawing blood) were prohibited from use by chiropractors.[36] The Mississippi State Board of Chiropractic Examiners has also arrived at this interpretation, reflected in rule 17 of its rules and regulations:

> No skin puncture shall be allowed for any type treatment or diagnostic purposes or for the collection of any specimen or for administration of any medication under the chiropractic licensure. There shall also be no GYN examinations performed.[37]

This rule, however, does not define the scope of the practice of chiropractic in Mississippi. Section 73-6-23 of the Act is helpful:

> Nothing in this chapter shall be construed as conferring upon the holder of such certificate the right to practice medicine and surgery as

---

percentage of chiropractors claim to treat nearly every type of illness. GOVERNOR'S TASK FORCE, *supra* note 15, at 19.

[32] *See* Report of the Comm. for Peer Review to the ACA House of Delegates, June 1972, at 11; Vogl, *supra* note 8, at 81.

[33] MISS. STATE BD. OF CHIROPRACTIC EXAMINERS, RULES AND REGULATIONS, (July 13, 1974).

[34] A physician is generally considered to be obligated to refer a patient to a specialist or person qualified in a technique of treatment in which the physician is not qualified, when he knows or should know that he is not qualified or that his method of treatment is ineffective. 61 AM. JUR. 2d *Physicians, Surgeons, and Other Healers* § 138 (1967); Annot., 58 A.L.R.3d 590-91 (1970). Some courts have held chiropractors to the same standard in negligence cases. *E.g.*, Salazan v. Ehmann, 505 P.2d 387 (Colo. Ct. App. 1972); Ison v. McFall, 55 Tenn. App. 326, 400 S.W.2d 243 (1964).

[35] WASH. REV. CODE ANN. § 18.25.30 (1961); Letter from C. G. Haynes, D.C., to T. O. Morgan, D.C., Nov. 30, 1974, on file with the *Mississippi Law Journal,* wherein C. G. Haynes candidly remarks:

> It might be almost amusing to you to know that the state attorney general's office subsequently asked the chiropractic disciplinary board members, "What does this mean?" Well, according to the wide-scope D.C. it could mean *anything all inclusive!* In fact, they were elated with the phraseology!

[36] State v. Wilson, 11 Wash. App. 916, 528 P.2d 279 (1974).

[37] RULES AND REGULATIONS, *supra* note 33, rule 17.

> a physician or osteopathic physician as defined by statute, to engage in the practice of physical therapy as defined by statute, to advise or prescribe the use of drugs by his patients, or to advise a patient not to use a drug prescribed by a licensed physician or dentist.

Since the Chiropractic Licensure Act does not extend the scope of chiropractic into the fields of medicine, surgery, or physical therapy, as defined by statute, these areas are excluded from the practice of chiropractic.[38]

Mississippi courts have strictly limited the scope of the practice of chiropractic to the treatment of human ailments by manipulation of the spine with the hands. In *Joyner v. State*,[39] the earliest appeal by a chiropractor from a conviction for practicing medicine without a license, the evidence showed that the chiropractor had attempted to remove a patient's tonsil by means of inserting a needle into the infected tonsil and then applying electric current. Excluding evidence that the chiropractor had been trained in this technique at a chiropractic school, the court held that the use of electric machines for therapeutic purposes pertained to the practice of medicine by physicians and surgeons. Far from unfriendly to chiropractic, the court noted in its affirmance of the conviction that most chiropractors were

> enjoying the respect and confidence of the public in their efforts to administer to human illness in their particular line of endeavor . . . [and] are content not to depart from their own profession of treating disease by manipulation of the spinal column by hand, or at least not to invade the field of medicine and surgery.[40]

In *Hayden v. State*,[41] distinguishable on its facts from *Joyner*, the Mississippi Supreme Court held that an unlicensed osteopath who treated disease by manipulation of the spine did not exceed the scope of his field and was not guilty of practicing medicine without a license. There, the prosecution argued unsuccessfully that a practitioner who treats by manipulation should be required, as a matter of common sense, to possess the same diagnostic ability as a physician, regardless of the method of treatment he uses, and that osteopathy was within the true definition of the practice of medicine. The court concluded, reversing for the defendant, that an osteopath's treatments were not "an appliance or agency . . . for the cure, relief or palliation of any ailment or disease of mind or body"[42] so as to be regulated by the Medical

---

[38] MISS. CODE ANN. § 73-6-23 (Supp. 1974).
[39] 181 Miss. 245, 179 So. 573 (1938).
[40] *Id.* at 254, 179 So. at 576.
[41] 81 Miss. 291, 33 So. 653 (1902).
[42] *Id.* at 291, 33 So. at 654.

Practice Act. This decision carved an early exception for osteopathy but has not been followed in cases involving chiropractors.[43] More recently, *Harris v. State*[44] held that the administration of vitamins by a chiropractor to correct a vitamin deficiency constituted the unlicensed practice of medicine.

Though the courts may be expected to follow the precedents of *Joyner* and *Harris,* the practical fact remains that rather than control the scope of the practice of chiropractic, the statutory definition of chiropractic provides opportunities for expansion if the State Board of Chiropractic Examiners is sympathetic with the "wide-scope" branch of chiropractic.[45] A majority of the present board advocates acts constituting the practice of medicine under Mississippi case law and have rejected disciplinary rules prohibiting such acts. Predictably, the board has also rejected disciplinary rules which would preclude chiropractors from using physical therapy equipment. Although this is an unsettled area in Mississippi, a Minnesota court has held the use of this equipment to constitute the unlicensed practice of physical therapy.[46] Clearly, the Chiropractic Licensure Act has provided no effective means of preventing unlicensed encroachment on the fields of medicine and physical therapy. Because the Act does not codify Mississippi case law restricting the practice of chiropractic to spinal manipulation, the scope of chiropractic is only specifically precluded from surgery and the prescription of drugs, remaining open conceptually to any breadth the Chiropractic Board's own interpretation may provide. From the standpoint of diagnosis, the chiropractor remains able to determine for himself what affliction a patient has and whether he can treat it, although he must make the diagnosis without the benefit of such procedures as blood tests, which constitute the practice of surgery. However severely a chiropractor may be handicapped by restrictions on technique or by the inadequacy of his training, he is not legally responsible to the patient for failing to diagnose a disease or refer the patient to someone who can diagnose disease, even though such a failure might constitute gross

---

[43] Today the Medical Practice Act treats both osteopaths and medical doctors as physicians. Licensing of osteopathic medicine is regulated by MISS. CODE ANN. § 73-25-25 (Supp. 1974), which requires applicants to pass the same examination as that required for medical licenses.

[44] 229 Miss. 755, 92 So. 2d 217 (1957).

[45] According to a chiropractic member of the State Board of Chiropractic Examiners, the majority of board members favor a "wide-scope" interpretation of the practice of chiropractic; these board members both treat patients with physical therapy equipment and prescribe vitamins. Letter from T. O. Morgan, D.C., to J. T. Gilbert, P.T., Nov. 1, 1974, on file with the *Mississippi Law Journal.*

[46] State Bd. of Medical Examiners v. Olson, No. 38,217 (Minn. 7th Dist. Ct., Sept. 27, 1974), *on remand from* 295 Minn. 379, 206 N.W.2d 12 (1973).

neglect under the standards applicable to physicians. While the public is vulnerable, the chiropractor is cloaked with the immunity of the customary chiropractic standard of care. Therefore, the scope of chiropractic remains under essentially the same degree of control as before the passage of the Chiropractic Licensure Act.

A. State Board of Chiropractic Examiners

Sections 73-6-3 to -21, creating the State Board of Chiropractic Examiners, empower the board to adopt rules and regulations necessary to carry out the provisions of the Act, and prescribe licensing qualifications, examinations, procedures, fees, reciprocity, and grounds and procedures for discretionary license refusal, cancellation, or suspension.[47]

Section 73-6-3 provides for a six-member State Board of Chiropractic Examiners with one member being the executive director of the State Board of Health[48] or his designee. Appointments of the other five members are made by the Governor, with advice and consent of the Senate, for 5-year terms. This section also provides that no more than three members of the board shall be members of either the Mississippi Society of Chiropractors ("straights") or the Mississippi Chiropractic Association ("mixers").[49] The reason for mandating participation by members of both of these organizations was probably to assure that the board was not completely controlled by either branch of chiropractic. In spite of this, however, the present board is dominated by "mixer" chiropractors who use "modalities" in their own practices.[50]

---

[47] MISS. CODE ANN. §§ 73-6-3 to -21 (Supp. 1974).

[48] *Id.* § 73-6-3.

[49] *Id.*

[50] Letter, *supra* note 45. Addressing the executive secretary of the State Physical Therapy Board, the writer states:

> Our chiropractic board was established in April of 1973. One of our first duties according to law was to establish rules and regulations. I brought up the subject of chiropractic scope of practice, and found that only one other chiropractor on the board besides myself was practicing spinal adjusting only. The other board members indicated that they were also using physical therapy machines and dispensing vitamins along with the adjustment. I then made the motion that we begin at once to stick to the letter of our new law (which does not examine in physical therapy subjects or vitamin therapy, and defines chiropractic as "the analysis of any interference to normal nerve transmission . . . and by adjustment of the articulations of the vertebral column . . . for the restoration and maintenance of health), by ruling out all physical therapy machines and vitamin therapy for use by chiropractors. This motion was defeated four to two.
>
> [The] executive director of the state board of health is also a member of our board and voted with me. Discussion followed to no avail and it was then made evident that I must go to the Attorney General to seek a ruling regarding the scope of practice for chiropractors. I was disappointed with my interview as

Section 73-6-13 sets license qualification standards, mandates the State Board of Health to prescribe rules and regulations for the operation and use of X-ray machines, and prescribes the content and procedure for approval of a proposed licensing examination.[51] The examination must test in

> practical, theoretical and physiological chiropractic analysis, theoretical and practical chiropractic, nerve tracing, spinal analysis, the operation of X-ray machines and interpretation of X-rays as applied to chiropractic use, and basic science knowledge of the subjects of anatomy, physiology and pathology.[52]

However, section 73-6-27, the Act's "grandfather clause," exempts persons from the licensure examination requirement who were engaged in the full-time practice of chiropractic prior to January 1, 1970, or in the full-time practice of chiropractic in Mississippi for a period of 8 years prior to the Act's passage, if they are graduates of a school approved by the International Chiropractors Association or American Chiropractic Association and apply within 90 days of the initial appointment of the Mississippi State Board of Chiropractic Examiners.[53] The Act, therefore, has no immediate effect on the qualifications of most chiropractors practicing in the state.[54] In addition to setting out the general licensing procedure, section 73-6-15 specifies that a certificate of licensure to practice chiropractic does not qualify a chiropractor to apply for practice on the medical staffs of hospitals licensed by the Mississippi Commission on Hospital Care, does not confer expert witness status, and does not make the chiropractor eligible for payment under workmen's compensation insurance or Medicaid benefits.[55]

Despite the apparent intent of these provisions to specify areas of

---

it seemed he would not rule, and later I received a letter saying that the board must make its own rules and regulations.

. . . .

It is my desire . . . that your board would appeal to the attorney general or the courts to keep the chiropractors from infringing upon the profession of physical therapy in which only you are educated and licensed to practice in the state of Mississippi. I am sure that you will agree that chiropractors should practice spinal adjusting or manipulation and procedures directly related to same only, rather than infringing on other professions, in which they are not necessarily qualified or even knowledgeable. I also feel that this would uphold the legislative intent and would protect the health of the people in Mississippi.

[51] MISS. CODE ANN. § 73-6-13 (Supp. 1974).

[52] *Id.*

[53] *Id.* § 73-6-27.

[54] There are approximately 150 chiropractors practicing in Mississippi. LICENSING PROPOSITION, *supra* note 9.

[55] MISS. CODE ANN. § 73-6-15 (Supp. 1974).

disqualification, the statutory language is ineffective because it does not positively prohibit chiropractic eligibility in these areas. Rather than controlling or limiting chiropractic, these provisions simply maintain the status quo.

The State Board of Chiropractic, under section 73-6-19, must refuse to license an applicant if any of nine specified grounds exist.[56] Where the grounds are found to apply to a licensed practitioner, however, the Act uses the permissive "may," allowing the board to cancel, revoke, or suspend the license.[57] Therefore, where licensed chiropractors are concerned, enforcement of the Act by withholding the privilege to practice is a matter of discretion with the board. The grounds for revocation are similar to and, in some instances, duplicate the grounds for revocation of a physician's license to practice medicine.[58] Whether the Chiropractic Licensure Act succeeds in controlling the practice of chiropractic will depend on the manner in which the board exercises its discretion.

B. Eligibility Under Medicaid

Presently, chiropractic is not eligible for compensation under Medicaid. Sixteen services are enumerated under Mississippi's Medical As-

---

[56] *Id.* § 73-6-19.

[57] *Id.*

[58] *See id.* § 73-25-29 (1972). The grounds for adverse action against a chiropractic licensee or applicant are:

> (1) failure to comply with the rules and regulations adopted by the state board of chiropractic examiners;
> (2) violation of any of the provisions of this chapter or any of the rules and regulations of the state board of health pursuant to this chapter with regard to the operation and use of X-rays;
> (3) fraud or deceit in obtaining a license;
> (4) addiction to the use of alcohol, narcotic drugs, or anything which would seriously interfere with the competent performance of his professional duties;
> (5) conviction by a court of competent jurisdiction of a felony, other than manslaughter or any violation of the United States Revenue Code;
> (6) unprofessional and unethical conduct;
> (7) contraction of a contagious disease which may be carried for a prolonged period;
> (8) failure to report to the welfare department or the county attorney any case wherein there are reasonable grounds to believe that a child has been abused by its parent or person responsible for such child's welfare;
> (9) advising a patient to use drugs, prescribing, or providing drugs for a patient, or advising a patient not to use a drug prescribed by a licensed physician or dentist.

Id. § 73-6-19 (Supp. 1974).

sistance for the Aged Act;[59] chiropractic is not among them.[60] Considering the potential economic stake involved in obtaining the inclusion of chiropractic under Medicaid,[61] it is not surprising that legislation for that purpose was prefiled for the 1975 regular session of the legislature.[62] The proposed legislation, entitled "An Act to Amend Section 73-6-15, Mississippi Code of 1972, to Provide That Chiropractors Shall Be Eligible for Payments Under Medicaid Benefits," would delete the phrase "or Medicaid benefits" from the last sentence of the section.[63] This bill appears to be both unnecessary and insufficient to change the eligibility of chiropractors for compensation under Medicaid. It appears unnecessary, because section 73-6-15 also states that nothing in the chapter will be construed to make a licensed chiropractor eligible for payment under workmen's compensation insurance,[64] yet both prior to and following passage of the Chiropractic Licensure Act, chiropractic treatments were compensable under workmen's compensation insurance on a case-by-case basis.[65] The amendment seems insufficient because the addition of categories of authorized services is controlled by the last paragraph of section 43-13-117 (Medical Assistance for the Aged Act):

> Notwithstanding any provision of this article, no new groups or categories of recipients and new types of care and services may be added without enabling legislation from the Mississippi legislature, except that the commission may authorize such changes without enabling

---

[59] *Id.* § 43-13-117.

[60] *See id.*

[61] During fiscal year 1974, 275,314 persons in Mississippi received medical assistance through Medicaid at a total program cost of $89,702,656. Total medical expenditures increased 44.5 percent over the figure for fiscal year 1973. Of this total, $18,880,249 was state money. The monthly average number of medical assistance recipients was 127,206, and the average amount spent per eligible person was $273.10. (This figure would be even higher per recipient, since not all eligibles received assistance.) Physicians' services accounted for $14,277,985 or 16.8 percent of total expenditures (down from 17.2 percent in fiscal year 1973); 72.3 percent of expenditures for physicians' services went to the over-21 age group, with the over-64 group accounting for 32.3 percent of the total. MISS. MEDICAID COMM., FIFTH ANNUAL REPORT 5, 8, 12, 17, 18, 23 (1974).

[62] S. 2093, Miss. Legislature, Regular Sess. (1975) (prefiled by Sen. Theodore Smith).

[63] *See id.*

[64] MISS. CODE ANN. § 73-6-15 (Supp. 1974).

[65] Interview with Jim Anderson, Claims Supervisor, Mississippi Workmen's Compensation Commission, in Jackson, Mississippi, January 6, 1975. Calls were also made to the claims department of Aetna and Traveler's insurance companies in Jackson. The companies indicated that no general rule of interpretation specifically qualified chiropractic treatment for reimbursement, but the standard of reasonableness, tempered by economic expediency, called for compensation for chiropractic treatments on a case-by-case basis, especially where the injury was minor, within the scope of physiotherapy, and the claimant returned to work promptly. Neither carrier, however, referred claimants to chiropractors, and both indicated that claims for compensation for chiropractic treatments were few in number and monetarily insignificant.

> legislation through a majority vote of its members when such addition of recipients or services is ordered by a court of proper authority.[66]

The state attorney general is of the opinion that section 43-13-117 would have to be amended in order for chiropractic services to be compensable under Medicaid.[67]

C. *Eligibility for Practice on Hospital Staffs*

Eligibility for practice on hospital staffs is probably not a future possibility for the chiropractor, but inclusion of such prohibition is important. Hospital staffs do occasionally include licensed physical therapists, and it is not inconceivable that a chiropractor using physical therapy equipment under a "modality-inclusive" concept of chiropractic might seek a hospital position as a lucrative avenue to prestige and professional status. But under the Chiropractic Licensure Act, a chiropractor, regardless of qualifications, cannot give the designation "physical therapy" to any form of treatment.[68] The specific prohibition is found in section 73-6-23, which prohibits a licensed chiropractor from engaging "in the practice of physical therapy as defined by statute."[69] Though sounding final, it is important to note that physical therapy is not defined by statute.[70] Further, the physical therapy licensing act specifically states that nothing in that act is to be construed as prohibiting the use of physical therapy equipment by other professions,[71] in spite of the fact that use of the equipment is dangerous.[72]

---

[66] MISS. CODE ANN. § 43-13-117 (Supp. 1974).

[67] Letter from Attorney General A.F. Summer to State Senator Ray H. Montgomery, May 3, 1973, on file with the *Mississippi Law Journal.*

[68] MISS. CODE ANN. § 73-23-5 (1972).

[69] *Id.* § 73-6-23 (Supp. 1974).

[70] *Id.* § 73-23-5 (1972) limits the use of the title "physical therapist" without defining the term and also specifically excludes the regulation of "physical therapy modalities" from its scope.

[71] *But see* State Bd. of Medical Examiners v. Olson, No. 38,217 (Minn. 7th Dist. Ct., Sept. 27, 1974), *on remand from* 295 Minn. 379, 206 N.W.2d 12 (1973).

[72] It is uncontroverted that ultrasonic, diathermy and electric muscle stimulator devices are inherently dangerous unless properly used and constitute a potential hazard to the patient on whom they are used. For that reason, they bear on their label a warning legend that: "Federal law restricts to sale by or . . ." on prescription of a qualified physician . . . and "Caution, this equipment is sold only for use by or under the direction of a qualified physician . . . ."

It is uncontroverted that before using ultrasound, diathermy or electric muscle stimulators in the treatment of human ailments, a careful medical diagnosis is necessary to determine whether any complications are present which may contraindicate their use.

Ultrasound and diathermy should not be used during pregnancy or applied

D. Eligibility Under Medicare

Compensation for chiropractic treatments under Medicare was effected automatically upon enactment of the Chiropractic Licensure Act, without specific reference, because the federal guidelines for eligible services are controlling.[73] The federal guidelines set up two hurdles for chiropractic qualification: First, that the chiropractor be licensed by the state in which he practices; and second, that compensation only apply to treatment to correct "by means of manual manipulation of the spine . . . a subluxation demonstrated by X-ray to exist."[74] The Act provides no compensation for the X-ray. This provision could cause unnecessary X-radiation as a prerequisite to compensation for the chiropractor, but the economic burden of the noncompensated X-ray may provide an offsetting negative incentive to treat subluxations except where traumatic injury, or history of traumatic injury, to supporting tissues indicates the diagnosis.[75]

E. Eligibility Under Workmen's Compensation Insurance

Chiropractors are eligible for compensation for services performed under workmen's compensation insurance on a case-by-case basis.[76] The jurisdiction and authority for determining eligibility are vested in the Workmen's Compensation Commission,[77] which makes a determination according to the particular facts and circumstances of each case.[78] Although the word "physician" appears throughout the act, and there are specific sections applying to other practitioners, chiropractors are not mentioned. One phrase in section 71-3-15 has been broadly interpreted by insurance carriers and the Workmen's Compensation Commission sometimes to include chiropractors:

> The employer shall furnish such medical, surgical, *and other atten-*

> to areas of the body where there is acute infection, benign or malignant tumor, inadequate circulation, impaired sensation, metallic implants, peripheral vascular disease, osteoporosis, thrombophlebitis, nor on patients suffering from ischemia, coronary or other cardiac disease, vascular occlusion of any kind, or hemorrhagic tendencies.

State Bd. of Medical Examiners v. Olson, No. 38,217 at 7-8 (Minn. 7th Dist. Ct., Sept. 27, 1974) (citations and paragraph numbers omitted).

[73] Chiropractic was included under Medicare by 42 U.S.C. § 1395x(r)(5) (Supp. III, 1973).

[74] *Id.* "The diagnosis of a subluxation can occasionally be confirmed and graphically recorded by stress X-ray films in which X-rays are taken during one or more phases of movement." J. BROOKE, *supra* note 3, at 26.

[75] *See* J. BROOKE, *supra* note 3, at 22-28.

[76] See note 65 and accompanying text *supra*.

[77] *See* Letter from attorney general, *supra* note 67.

[78] See note 65 *supra*.

> *dance or treatment,* nurse and hospital service, medicine, crutches, artificial members, and other apparatus for such period as the nature of the injury or the process of recovery may require.[79]

Although compensable medical services are not limited to those of medical doctors,[80] one view is that chiropractic treatments are excluded,[81] since they are not "medical treatment." There is, however, a line of cases in which compensation for chiropractic treatment is discussed, but compensation has not been excluded on the specific grounds of not being the kind of medical treatment authorized by statute.[82]

F. Chiropractor's Status as an Expert Witness

Licensing did not change the status of chiropractors as expert witnesses in Mississippi.[83] The qualification of a witness as an expert is not amenable to specific rules but is left to the trial judge's discretion, subject to review for abuse.[84] Although a search has not produced any reported Mississippi case on the capacity of a chiropractor to testify as an expert, other jurisdictions and legal authorities are in agreement that a qualified chiropractor is generally competent to testify as an expert on matters within the scope of chiropractic.[85] The difficulty is in determining which areas are included within the scope of a limited practitioner.[86] Although this is not a frequently litigated area, one au-

---

[79] MISS. CODE ANN. § 71-3-15 (1972) (emphasis added).

[80] 2 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 61.13, at 10-468 n.78.1 (1975).

[81] *E.g.*, Ingebritson v. Tjernlund Mfg. Co., 289 Minn. 232, 183 N.W.2d 552 (1971) (employer not liable for payment of bills for chiropractic treatment incurred in a case of compensable injury, because the treatment was not "medical treatment").

[82] *See, e.g.*, Divito v. Fuller Brush Co., 217 So. 2d 313 (Fla. 1969); Stich v. Independent Life & Accident Ins. Co., 139 So. 2d 398 (Fla. 1962); Tom Still Transfer Co. v. Way, 482 S.W.2d 775 (Tenn. 1972); Olivarez v. Texas Employers' Ins. Ass'n, 486 S.W.2d 884 (Tex. Civ. App. 1972).

[83] *See* Letter from attorney general, *supra* note 67. *See also* MISS. CODE ANN. § 73-6-15 (Supp. 1974).

[84] C. MCCORMICK, EVIDENCE § 13, at 30 (2d ed. 1972). *See also* Illinois Cent. R.R. v. Benoit Gin Co., 248 So. 2d 426 (Miss. 1971).

[85] *See* 31 AM. JUR. 2d *Chiropractors* § 107 (1967); Annot., 52 A.L.R.2d 1384 (1957); 32 C.J.S. *Evidence* 546(93) (1964); Comment, *Chiropractors as Expert Medical Witnesses*, 20 CLEV. ST. L. REV. 53, 57 (1971). "It is quite significant that no reported case decision has held that a chiropractor is not competent to testify within the scope of his profession." *Id.* at 59.

[86] *See* Chalupa v. Industrial Comm'n, 109 Ariz. 340, 509 P.2d 610 (1973) (since a chiropractor is not a medical doctor, he is not competent to testify on occupational diseases such as silicosis); Cavell v. Winn, 154 So. 2d 788 (La. Ct. App. 1963) (chiropractic testimony excluded as to the medical connection between spinal injury and tonsilitis, vaginal bleeding, burning of the eyes, and stomach trouble); Suris v. Government Employees Ins. Co., 53 Misc. 2d 454, 278 N.Y.S.2d 708 (App. T. 1967) (chiropractor not

thor sees the admissibility of chiropractic testimony increasingly contested and closer attention being paid by the courts to the specialized nature of chiropractic in determining admissibility.[87] In qualifying medical experts, Mississippi courts have tended to use their discretion, looking beyond mere physician status to determine special competency in the issue area.[88] Chiropractic testimony interpreting X-rays is generally admissible when the X-ray photographs are properly identified and the subject matter is considered to be within the purview of chiropractic.[89] Some courts in early cases even admitted chiropractic testimony interpreting X-rays in malpractice cases against physicians.[90] In Mississippi, it is not necessary to be a physician to testify as to the interpretation of X-ray photographs, so long as the witness is demonstrated to possess the necessary skill and experience.[91] Because chiropractic is limited by statute to a narrow area, courts are likely to construe the definition of chiropractic narrowly in determining the competency of chiropractic testimony regarding future medical requirements and the extent and permanence of personal injuries.

G. Control of X-Radiation

The passage of the Chiropractic Licensure Act effected no additional controls over the use of X-radiation equipment by chiropractors, because the State Board of Health began inspecting chiropractic X-ray

---

qualified to testify that in his opinion his treatment was a necessary medical expense resulting from an accident); Allen v. Hinson, 12 N.C. App. 515, 183 S.E.2d 852 (1971) (chiropractor qualified without objection to testify within scope of "chiropractory," should not have been allowed over objection to express expert opinion as to diagnosis, treatment, disability, and permanence of a back injury). *Contra*, Line v. Nourie, 215 N.W.2d 52 (Minn. 1974) (chiropractor held competent to testify as to "reasonable chiropractic certainty" of probable effects, permanence, and future medical requirements of an injury when property qualified).

[87] *See* Comment, *The Chiropractor as an Expert Witness*, 15 MERCER L. REV. 431, 436 (1964); Annot., *supra* note 85.

[88] J.W. Sanders Cotton Mill, Inc. v. Moody, 189 Miss. 284, 195 So. 683 (1940) (chiropodist held competent to testify as to personal injuries); Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63 (1938) (X-ray technician with 15-years experience reading and interpreting X-rays, competent to state that pictures disclosed fractures of the vertebrae); Russell v. State, 53 Miss. 367 (1876) (M.D. with 20 years in practice was not expert in psychological medicine, and held incompetent as an expert on the question of insanity). *See also* Early-Gary, Inc. v. Walters, 294 So. 2d 181 (Miss. 1974) (to qualify as an expert in a field, a profferred expert must be shown to have acquired a special knowledge of the matter about which he is to testify; the knowledge may be obtained either by study of recognized authorities, or through practical experience).

[89] *See* Annot., *supra* note 85.

[90] *See, e.g.*, Dorr v. Headstream, 173 Ark. 1104, 295 S.W. 16 (1927); Ness v. Yeomans, 60 N.D. 368, 234 N.W. 75 (1931).

[91] *See, e.g.*, Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63 (1938).

devices in 1970, pursuant to a directive from State Senator Hayden Campbell.[92] Prior to that time, the policy of the State Board of Health's Radiological Control Agency had been to interpret enabling legislation as authorizing only inspection of equipment used by licensed practitioners.[93] There was no control of nonionizing sources of radiation in the state prior to 1960, when the Radiological Health Division of the State Board of Health was developed.[94] In a July 1962 agreement between the state and the Atomic Energy Commission, Mississippi adopted AEC rules and regulations and complied with national standards.[95] Today, the State Board of Health does not license users of X-radiation; it simply inspects emissions and registers devices.[96] The language of the second paragraph of section 73-6-13: "The state board of health shall prescribe rules and regulations for the operation and use of X-ray machines,"[97] seems to extend the State Board of Health's authority beyond the inspection of emissions to the area of "technique." Although the State Board of Health has an interest in regulating technique, it has never done so.[98] It is reluctant to do so now because it believes that its rules and regulations would have to apply to all practitioners and yet be fashioned so as not to interfere with the legitimate scope of one practitioner's practice while reaching for greater control over another. Since the mission of the Radiological Health Division is to eliminate unnecessary nonionizing radiation exposure,[99] the control of "techniques" which result in unnecessary radiation exposure would seem to be within its statutory responsibility.

H. Prohibited Conduct

Section 73-6-25, entitled "Prohibited conduct," deals with abuse of titles, advertising, offers of discounts, free services, guarantees, violation of rules regulating the use and operation of X-rays, permissible telephone directory listings, and letters to clients. Together with practicing outside the scope of chiropractic,[100] conduct in violation of this section

---

[92] Interview with Eddie Fuente, Director of Radiological Health, Mississippi State Board of Health, in Jackson, Mississippi, Jan. 3, 1975.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] MISS. CODE ANN. § 73-6-13 (Supp. 1974).

[98] *See* Interview with Eddie Fuente, *supra* note 92.

[99] *Id.*

[100] *See* GOVERNOR'S TASK FORCE, *supra* note 15, at 19.

constitutes the area of chiropractic activity of greatest concern to the medical profession.[101]

Section 73-6-25(a)(1) prohibits chiropractors, licensed or unlicensed, from misleading the public regarding chiropractic services[102] and from using "any other professional designation other than the term 'chiropractor.' "[103] A patient assumes the risks inherent in the treatment used by a "drugless" practitioner when he seeks treatment from a chiropractor.[104] Consequently, the patient should be given notice by means of the practitioner's professional designation as to which branch of the healing arts he is a member.[105] Although section 73-6-25 rather clearly stipulates that chiropractors shall not mislead the public *or* use any professional designation other than "chiropractor," rule 9, adopted by the Mississippi State Board of Chiropractic Examiners, authorizes the use of the title "Dr."[106]

The attorney general's office refuses to express an opinion as to whether the title "Dr." before a name followed by the term "chiropractor" after the name is a professional designation.[107] Although the title

---

[101] Interview with William F. Roberts, Executive Assistant, Mississippi State Medical Association, in Jackson, Mississippi, Dec. 19, 1974.

[102] MISS. CODE ANN. § 73-6-25(a)(1) (Supp. 1974).

[103] *Id.*

[104] *See* Bryant v. Biggs, 331 Mich. 64, 49 N.W.2d 63 (1951); Nicodeme v. Bailey, 243 S.W.2d 397 (Tex. Civ. App. 1951) (chiropractor's manipulation of neck found to be immediate cause of injury to patient, but judgment for defendant since his actions were within the standards of that profession). *Contra*, Edkins v. Edwards, 235 So. 2d 200 (La. Ct. App. 1970) (medical testimony was used to establish standard of treatment where chiropractic manipulation caused cervical disc rupture; at that time, Louisiana law required a medical license in order to practice chiropractic). *See also* 61 AM. JUR. 2d *Physicians and Surgeons* § 108 (1972); Annot., 19 A.L.R.2d 1188, 1219 (1951).

[105] *1964 Hearings, supra* note 4, at 233. *See also* Harris v. State, 229 Miss. 755, 762, 92 So. 2d 217, 220 (1957) (patient went to chiropractor using title "Dr. Harris" because she thought he was a medical doctor).

[106] RULES AND REGULATIONS, *supra* note 33, rule 9:

> USE OF THE TITLE "DR." - A chiropractor may use the title "Dr." only if the word "Chiropractor" appears after his last name. He may also use the title "D.C." after his last name and eliminate the title "Dr.". The words "Chiropractic physician" or "Physician" shall not be used.

[107] Whether or not the term "Dr." constitutes a professional designation is a judicial determination which must be made initially by the State Board of Chirorpractic [*sic*] Examiners from whose decision appeal may be had to the courts. This is not the type of matter that can be settled by opinion from the Attorney General's Office.

Letter from attorney general, *supra* note 67. Despite the opinion of the attorney general's office, MISS. CODE ANN. § 73-6-29(b) (Supp. 1974) specifically provides authority for involvement by the attorney general: "[T]he attorney general of Mississippi may institute legal action as provided by law against any person violating the provisions of this chapter . . . ."

"Dr." has been held in some jurisdictions to represent a professional designation for medical doctors,[108] others have allowed chiropractors to use the title "doctor,"[109] further confusing the public as to the distinctions between chiropractic and the medical profession.[110]

Subsections 2 through 6 of section 73-6-25(a) prohibit chiropractors from engaging in virtually all forms of advertising except announcements of clinic openings or movings, and prohibit offers of free professional services, free examination, discounts, guarantees, or painless treatment.[111] Since the passage of the Chiropractic Licensure Act, the Mississippi State Medical Association has noted a reduction in advertising by chiropractors.[112] Instances of chiropractic advertising have continued, however, and some advertisements have appeared in north Mississippi which were ostensibly placed by the "Mississippi Society of Chiropractic, Northern District,"[113] to "educate" the public. Rule 10, adopted by the Mississippi State Board of Chiropractic Examiners, construes the prohibition of advertising as follows:

> ADVERTISING - (That material that solicits patronage to a specific doctor or clinic for a specific service.) Individual advertising is prohibited by law. The only advertising that is allowed must comply with Section 13(3) pertaining to the new clinics, and this is for general circulation.[114]

Although this rule construes the statutory prohibition of advertising to apply to "individual advertising," the attorney general has construed it as prohibiting advertising at the instance of a chiropractor,[115] which clearly would include "foundation" advertising on behalf of or at the instance of any chiropractor or group of chiropractors. The last sentence of section 73-6-25(b) provides: "Nothing herein shall be construed to prohibit a licensed practitioner from mailing letters to his clients, but such letters shall otherwise be subject to the provisions of this section."[116] Rule 10, adopted by the State Board of Chiropractic Examiners, interprets this sentence and the general advertising prohibitions of sec-

---

[108] *See, e.g.*, State v. Bain, 130 Mont. 90, 295 P.2d 241 (1956); Reeves v. State, 36 Okla. Crim. 186, 253 P. 510 (1927); State v. Yegge, 19 S.D. 234, 103 N.W. 17 (1905).

[109] *See, e.g.*, Martin v. Commonwealth, 121 Va. 808, 93 S.E. 623 (1917) (the designation "Dr." applied broadly to medical practice and its branches, including nonphysicians).

[110] *See* Comment, *California Cancer Quack Laws: The Best Is None Too Good,* 40 S. CAL. L. REV. 384, 388 (1967).

[111] MISS. CODE ANN. §§ 73-6-25(a)(2) to (6) (Supp. 1974).

[112] Interview with William F. Roberts, *supra* note 101.

[113] *Id.*

[114] RULES AND REGULATIONS, *supra* note 33, rule 10.

[115] Letter from attorney general, *supra* note 67.

[116] MISS. CODE ANN. § 73-6-25(b) (Supp. 1974).

tion 73-6-25(a) as not prohibiting the general mail-out of educational material "(that material that educates a person to chiropractic, but does not solicit) . . . as long as it is identified with and/or paid for by a district, state or national organization," and does not castigate any other profession.[117] This interpretation is not supported by the intent or the clear statement of the law in section 73-6-25 which sanctions only "letters to clients," not general mail-outs, and makes no distinction between "advertising" and "educational materials."[118] Whatever term is used, the intent to place chiropractic before the public is a form of advertising, and the message is subject to review for its tendency to deceive or mislead the public.[119]

II. Enforcement

While the licensing process is intended to protect the public by preventing incompetent or unscrupulous persons from entering chiropractic, this screening process does not affect the entry of persons qualifying under the "grandfather clause."[120] Additionally, since conduct prior to licensing was virtually unregulated, it would not be surprising if a few practitioners continue to engage in activities now prohibited by law or beyond the statutory scope of chiropractic. The statutory definition of chiropractic, prohibitions, and grounds for license revocation should be sufficient notice to inform licensed chiropractors of their limits. Even so, persons who intentionally disregard the law must be dealt with. The three methods for enforcement contained within the Licensure Act are license cancellation, revocation, or suspension; criminal prosecution; and injunction. Methods of enforcement available outside the Act are writs of mandamus, suits to enjoin violation of other laws as nuisances, criminal prosecution for criminal acts not covered by the Act, and civil suits for tort liability.

A. Cancellation, Revocation, or Suspension of License

The Chiropractic Licensure Act provides grounds for cancellation, revocation, or suspension of license by the State Board of Chiropractic

---

[117] Rules and Regulations, *supra* note 33, rule 10.

[118] *See* Miss. Code Ann. § 73-6-25(b) (Supp. 1974).

[119] *See generally* Sassone v. Board of Chiropractic Examiners, 201 Cal. App. 2d 165, 20 Cal. Rptr. 231 (1962) (hearing officer's finding that advertisement of chiropractor concerning cancer of the bowels and rectum constituted "invitation" to general public that chiropractor could detect and cure cancer and was "advertising" in violation of administrative rule of the Board of Chiropractic Examiners).

[120] Miss. Code Ann. § 73-6-27 (Supp. 1974).

Examiners.[121] In addition to conviction of a crime, grounds for censure include unprofessional conduct; incapacity; failure to comply with rules and regulations adopted by the State Board of Chiropractic Examiners; and advising a patient to use drugs, prescribing or providing drugs for a patient, or advising a patient not to use a drug prescribed by a licensed physician or dentist.[122] Violation of the section on prohibited conduct[123] is not grounds for license revocation, except for violation of rules and regulations regarding the operation and use of X-rays which appear in both places. There are no grounds, therefore, for revoking a chiropractic license for false or misleading advertising, except as a violation of the rules and regulations of the Board of Chiropractic Examiners.

The Act does not state who may bring charges against a chiropractor. When charges are brought, a copy is given to the accused chiropractor, and formal hearings are held before the board in Jackson, Mississippi.[124] The accused chiropractor may be represented by counsel, and he may examine witnesses.[125] There is no provision for notice of a time and place of hearing. It is unclear whether the right to examine witnesses includes the right to call witnesses on the chiropractor's behalf. The statute speaks of "the finding of the following facts," and contains no other reference to the type of deliberation.[126] It is not clear whether the board sits only as a trier of facts or whether it can also decide questions of law as they arise. The burden of proof rests on the person making the charge, and the standard applied is "substantial evidence."[127]

The practitioner whose license is revoked or suspended has the right to de novo review in the circuit court and further appeal to the supreme court.[128] This procedure is likely to be ineffective, since a majority of the members of the State Board of Chiropractic favor the widespread use of "modalities," use of the title "Dr.," and advertising in the form of "educational materials."

B. Criminal Prosecution

Although criminal prosecution may serve as grounds for license revocation, it is also an alternative to such a proceeding. Conviction of

---

[121] *Id.* § 73-6-19.

[122] *Id.*

[123] *Id.* § 73-6-25.

[124] *Id.* § 73-6-19.

[125] *Id.*

[126] *Id.*

[127] *See, e.g.*, Mississippi State Bd. of Dental Examiners v. Mandell, 198 Miss. 49, 21 So. 2d 405 (1945) (evidence before state board insufficient to establish that a statement by a dentist regarding his education was wilfully false rather than mistaken).

[128] MISS. CODE ANN. § 73-6-19 (Supp. 1974).

a serious crime is a terrible blow to the reputation of any reputable practitioner, regardless of the action taken against his license. The difficulty in obtaining a criminal conviction may offer an irresistible temptation to unscrupulous practitioners, however, who may regard license revocation as the more serious consequence of illicit activity.

Section 73-6-29(a) makes violation of the provisions of the Chiropractic Licensure Act a misdemeanor, punishable upon conviction by a fine of not less than $100 or more than $500 and/or imprisonment in the county jail for not less than 30 days or more than 1 year.[129] Since this section applies to the entire Act, the prohibited conduct enumerated under section 73-6-25, primarily abuse of professional titles and use of advertising, is subject to criminal sanctions. The more serious conduct enumerated under section 73-6-19 as grounds for license revocation is not made subject to the criminal sanctions of section 73-6-29(a) since they are mentioned only with reference to proceedings against a license. Some grounds for license revocation, however, are also criminal violations, such as subsection (9), "advising a patient to use drugs, prescribing or providing drugs for a patient, or advising a patient not to use a drug prescribed by a licensed physician or dentist."[130] This type of activity would be in violation of the Medical Practice Act,[131] as would the conduct prohibited by rule 17, adopted by the State Board of Chiropractic Examiners:

> ACUPUNCTURE, VENA PUNCTURE, GYN - No skin puncture shall be allowed for any type treatment or diagnostic purposes or for the collection of any specimen or for administration of any medication under the chiropractic licensure. There shall also be no GYN examinations performed.[132]

Conviction for violation of the Medical Practice Act,[133] or Physical Therapist Licensing Act,[134] would depend on very strict construction of the definition of chiropractic.[135] If a chiropractor's treatment outside the scope of chiropractic led to damage or injury, he could be subject to criminal prosecution for practicing medicine without a license,[136] man-

---

[129] *Id.* § 73-6-29(a).

[130] *Id.* § 73-6-19(9).

[131] *See id.* § 73-25-33 (1972).

[132] RULES AND REGULATIONS, *supra* note 33, rule 17.

[133] MISS. CODE ANN. § 73-25-33 (1972).

[134] *Id.* §§ 73-23-1 to -25.

[135] *See, e.g.*, State Bd. of Medical Examiners v. Olson, No. 38,217 (Minn. 7th Dist. Ct., Sept. 27, 1974), *on remand from* 295 Minn. 379, 206 N.W.2d 12 (1973); Harris v. State, 229 Miss. 755, 92 So. 2d 217 (1957); Joyner v. State, 181 Miss. 245, 179 So. 573 (1938).

[136] *See* cases cited note 135 *supra*.

slaughter,[137] or murder.[138] Prosecution for practicing medicine or some other profession without a license is not an effective means of enforcement since misdemeanors, usually punished by fines only, will not prevent recurring violations. Because of the leniency of juries, reluctance of prosecutors to prosecute popular irregular practitioners, and insufficiency of penalties, criminal prosecution is not an effective means of enforcement, except for serious crimes.[139]

C. Injunction

The State Board of Chiropractic Examiners, any district or county attorney, or the attorney general of Mississippi may request an injunction under section 73-6-29(b) in the chancery court against violators of the Licensure Act.[140] It is not clear whether a suit seeking an injunction could be brought under the Act by others, but there is no specific prohibition. This form of proceeding is advantageous because it is heard by a judge, less subject than a jury to sympathy for the practitioner's claim that he is a victim of persecution by organized medicine.[141] A second advantage to this type of proceeding is that a convicted defendant is subject to summary fine and imprisonment for contempt if he violates the court's restraining order.[142] The problem with injunctions is that there are limitations on when they may be granted and the proper parties to initiate the proceedings.[143] Where a criminal remedy is available, this remedy is often viewed as adequate grounds for refusing injunctive

---

[137] *See* Comment, *A New Test for Involuntary Manslaughter in California,* 8 STAN. L. REV. 463 (1956).

[138] *See, e.g.*, People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966) (chiropractor treated child with fast-growing eye cancer by adjustments, depriving her of surgical treatment until case became hopeless).

[139] B. SHARTEL & M. PLANT, LAW OF MEDICAL PRACTICE 234-36 (1959).

[140] MISS. CODE ANN. § 73-6-29(b) (Supp. 1974).

[141] B. SHARTEL & M. PLANT, *supra* note 139, at 237.

[142] *Id.*

[143] *See* New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co., 90 N.H. 368, 9 A.2d 513 (1939), stating the general rule that a holder of a statutory license is entitled to injunctive relief only if a defendant's unlawful practice threatens irreparable injury to the right conferred by the license, or common law remedies afford inadequate relief, or the infringement of his license is a public nuisance. In this case, the court held that the intent of the act conferring the right was not to grant a monopoly but to protect the public from incompetent practitioners, and, therefore, the plaintiff had no property right to noncompetition. *Compare* People *ex rel.* Shepardson v. Universal Chiropractors' Ass'n, 302 Ill. 228, 134 N.E. 4 (1922) (the practice of chiropractic without a license will not be enjoined because it is not a public nuisance, not being a menace to the public health, morals, safety, or welfare), *with* Redmond v. State *ex rel.* Attorney Gen., 152 Miss. 54, 118 So. 360 (1928) (quo warranto is the proper remedy where the unlicensed practitioner is in fact incompetent and the remedy at law inadequate as illegal practice of medicine constitutes a public nuisance).

relief.[144] Statutes granting injunctive powers are often construed as charging the attorney general or prosecutor exclusively with initiation of the proceeding.[145] In more recent decisions, however, courts reach beyond these limitations to allow injunctive relief in unlicensed practice proceedings.[146] Since section 73-6-29(b) expressly makes an injunction available to the State Board of Chiropractic Examiners but does not specifically exclude its use by other professional groups,[147] a court could afford individual practitioners or medical societies the same relief.[148]

D. Malpractice

Chiropractors, like medical doctors, are subject to liability for damages caused by their negligence. The principal difference between a malpractice suit against a defendant physician and a defendant chiropractor is the professional standard of care by which the practitioner's conduct is evaluated.[149] A practitioner is judged by the standard of care of the school to which he belongs.[150] Once he takes a case, he assumes the duty of possessing the learning and skill of the average practitioner in the same or similar community, and of using that skill and learning with reasonable care and his best judgment.[151] A chiropractor is not responsible for reasonable mistakes in judgment, but he is liable for damages proximately caused by his negligent failure to make a proper diagnosis.[152] Usually expert testimony is required to support an action for malpractice in order to establish the standard of care of the school of practice in a locality.[153] Where two schools use similar theories for

---

[144] *See, e.g.*, Redmond v. State *ex rel.* Attorney Gen., 152 Miss. 54, 188 So. 360 (1928).

[145] B. SHARTEL & M. PLANT, *supra* note 139, at 237.

[146] *See, e.g.*, Darby v. Mississippi Bd. of Bar Admissions, 185 So. 2d 684 (Miss. 1966) (suit to enjoin alleged practice of law by a chancery court clerk); Conway v. Mississippi State Bd. of Health, 252 Miss. 315, 173 So. 2d 412 (1965) (suit to enjoin practice of medicine by licensee whose license was invalid because of failure to rerecord license within 60 days of change of county of residence); Busch Jewelry Co. v. State Bd. of Optometry, 216 Miss. 475, 62 So. 2d 770 (1953) (suit to enjoin practice of optometry by corporation and employee licensed to practice medicine). *See generally* Annot., 90 A.L.R.2d 77 (1963).

[147] *See* MISS. CODE ANN. § 73-6-29(b) (Supp. 1974).

[148] A private individual or association usually can only obtain an injunction to protect a private interest, such as property, from infringement. Some cases have held that the individual physician or medical association has no property right to defend against unlicensed practitioners. *See, e.g.*, New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co., 90 N.H. 368, 9 A.2d 513 (1939). *Contra,* Busch Jewelry Co. v. State Bd. of Optometry, 216 Miss. 475, 62 So. 2d 770 (1953).

[149] *See* Comment, *The Standard of Care of the Drugless Healer,* 27 WASH. L. REV. 38 (1952).

[150] 24 AM. JUR. PROOF OF FACTS *Chiropractic Malpractice* § 21 (1970).

[151] *Id.*

[152] *Id.* § 24.

[153] Annot., 81 A.L.R.2d 597 (1962).

diagnosis and treatment, courts have allowed testimony from a different school to ascertain the applicable standard of care.[154] The requirement of evidence to establish the standard of care has been found unnecessary where the lack of care was so extreme as to be apparent to laymen that it was not reasonably within the profession's standard of care.[155] Where the practitioner diagnoses or treats outside the scope of his field, however, his treatment is subject to evaluation according to the standards of the field to which the treatment relates.[156] Crucial, then, to any malpractice case involving a defendant chiropractor is a determination of the scope of chiropractic. If chiropractic is held to be limited to diagnosis of a condition as a misaligned vertebrae for which manipulation is the accepted chiropractic treatment, a duty should be imposed on chiropractors to refer any diagnosis or treatment beyond this limited area of competence to qualified practitioners.[157] In this way, the risks taken by ignorant, credulous persons who believe chiropractic can cure major illnesses will be minimized, and they will not be isolated from the mainstream of medical science. Furthermore, malpractice litigation can provide a means of enforcing the existing law limiting the practice of chiropractic to its strictly confined area of competence.

CONCLUSION

Does the present Chiropractic Licensure Act upgrade the chiropractic profession and protect the public? Certainly, licensure itself raises the professionalism of chiropractic and tends to lend chiropractic greater credibility through the implication of official endorsement. The Act gives chiropractic a vested interest in the reputation of the profession as a whole, and through the State Board of Chiropractic Examiners, provides a vehicle for protecting it from ill repute attributable to the conduct of incompetent or otherwise objectionable practitioners. The Act's education and examination requirements do not affect the qualifications of chiropractors now in practice but may serve to eliminate unqualified persons seeking to practice here in the future. The passage of the Act has been followed by a reduction in advertising by chiropractors, which reduces the appearance of quackery.[158] But even

---

[154] *See, e.g.*, James v. Falk, 226 Ore. 535, 360 P.2d 546 (1961); Porter v. Puryear, 258 S.W.2d 182 (Tex. Civ. App. 1953). *See also* Annot., 85 A.L.R.2d 1022 (1962).

[155] Malmstrom v. Olsen, 16 Utah 2d 316, 400 P.2d 209 (1965). *See* Note, *supra* note 7, at 721.

[156] Correll v. Goodfellow, 255 Iowa 1237, 125 N.W.2d 745 (1964); Dowell v. Mossberg, 226 Ore. 173, 355 P.2d 624 (1960).

[157] Carney v. Lydon, 36 Wash. 2d 878, 220 P.2d 894 (1950); Kelly v. Carroll, 36 Wash. 2d 482, 219 P.2d 79 (1950).

[158] FOOD & DRUG ADMINISTRATION, DEP'T OF HEW, FDA PUB. NO. 19-A, YOUR MONEY AND YOUR LIFE 26 (1964).

when a reduction of misleading or intentionally deceptive advertising, the uninformed and unsophisticated elements of the general public are likely to remain confused as to a chiropractor's calling, because the State Board of Chiropractic Examiners sanctioned the use of the title "Dr."[159] The Act's inclusion of requirements for regulation of the use and operation of X-rays is without any present impact but does afford an approach for future regulation of technique and, hopefully, unnecessary X-radiation exposure. While the Act has had no effect on the compensation of chiropractic treatment (on a case-by-case basis) under workmen's compensation insurance, it immediately qualified chiropractors to perform services under Medicare and opened the way for future legislative inclusion under Medicaid. The desirability of including an ineffective system for treating disease in costly tax-supported health maintenance programs is elusive, logically, if not politically. The worst aspect of the Act, and most dangerous consequence to the public, is the lack of a clear definition, specifically circumscribing the practice of chiropractic to the diagnosis of misaligned vertebrae, and the treatment thereof by manipulation. The present vague and unfortunately worded definition provides opportunities for evasion of a limited license by gradual encroachment into areas in which chiropractors are uneducated, unqualified, and unlicensed, such as medicine and physical therapy. Although the State Board of Chiropractic Examiners has not yet adopted an interpretation of the statutory definition of chiropractic, the majority of members of the board presently using "modalities" and prescribing vitamins can be expected to adopt a broad interpretation, inclusive of modalities and possibly all-inclusive.

It is not doubted that chiropractic treatments have beneficial short-term effects on patients suffering from certain types of symptomatic pain and discomfort which respond to massage and physical therapy techniques.[160] Evidence of the fact that people believe they are helped is found in numerous testimonials.[161] The problem is that many people confuse chiropractic with medicine,[162] or for some other reason are deceived into believing that chiropractors are qualified to diagnose and treat disease.[163] Although there are therapeutic benefits to proper cases from some chiropractic techniques, these benefits are also available from licensed physical therapists who treat patients only on referral from a physician. Since physical therapists do not diagnose disease, their treatments do not involve the risk of medical neglect, and because

---

[159] RULES AND REGULATIONS, *supra* note 33, rule 9.

[160] GOVERNOR'S TASK FORCE, *supra* note 15, at 38-39.

[161] *Id.*

[162] *See, e.g.*, Harris v. State, 229 Miss. 755, 762, 92 So. 2d 217, 220 (1957).

[163] GOVERNOR'S TASK FORCE, *supra* note 15, at 38-39.

they see only patients referred by licensed physicians, their therapy is not applied where it would be ineffective or would aggravate a preexisting condition.

Future legislation should be sought to clarify the scope of chiropractic. Enforcement of the Act should be strengthened by broadening the provision for injunctive relief to allow professional associations and individual practitioners to initiate proceedings. If the State Board of Chiropractic Examiners fails to enforce the Act, the board should be dissolved legislatively, with its function consolidated with the State Medical Board. But unfortunately, the shortcomings of the Chiropractic Licensure Act are basic and far reaching; it is not realistic to look for the needed overhaul from the legislature which recently enacted it. The courts are peculiarly well suited to cure the ills of this defective legislation through judicial development of a chiropractic standard of care suited to chiropractic therapeutic techniques, while recognizing the incompetence of chiropractors to diagnose the presence of disease or to prescribe appropriate treatment.[164] To utilize the therapeutic skills of chiropractors, while preventing dangerous quackery, one author has proposed that the standard of care applied to physical therapists be applied to chiropractors:

> Physical therapists do not attempt to diagnose disease because they recognize that their limited training does not qualify them to do so. If chiropractors were treated in the same manner as physical therapists for the purpose of establishing the appropriate standard of care, chiropractors would no longer be able to avoid liability merely by showing that every other chiropractor in the locality would have made the same unscientific and often absurd diagnosis. Thus if a chiropractor failed

---

[164] Judicial adjustment of the standard of care of a profession, for the public protection, in conscious disregard of customary practice, is an established principle which was recently applied in Helling v. Carey, 83 Wash. 2d 498, 519 P.2d 981 (1974). This was a malpractice action against two opthamologists whose patient claimed to have suffered permanent visual damage due to open-angle glaucoma, as a result of defendants' failure to diagnose and treat the condition. The trial court entered judgment for defendants. The court of appeals affirmed, and the patient petitioned for review. The state supreme court reversed, holding that the defendants were negligent as a matter of law in failing to administer a simple glaucoma test to the patient despite uncontradicted expert testimony that it was the universal practice of opthamologists not to administer glaucoma tests to patients under age 40 because the incidence of glaucoma at younger ages was very slight. The court quoted Judge Learned Hand in The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932):

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. *Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.*

Id. at 740 (emphasis added).

> to refer a patient, for whom manipulations would be ineffectual or dangerous, to a more qualified practitioner, he could be held liable in tort for the resulting injury and, in addition, face the loss of his license to practice since the reasonable and prudent physical therapist would have made a proper referral.
>
> There are several advantages in this solution. First, chiropractors could continue practice without having to abandon their basic theory that spinal manipulation will remove the cause of disease. Extensive legislation would not be needed because the change could be implemented by the courts. Further, the chiropractor's limited knowledge of correct diagnosis could be eliminated as a basis for establishing the standard of care by which chiropractors would be judged in a malpractice suit. Finally, it would force the profession to reevaluate its role as a healing art or face virtually strict liability for exceeding the proscribed limits of practice.[165]

The proposed solution would place the chiropractic profession under adequate control, with society benefiting from therapeutic skills which some practitioners have developed to a high degree. Concurrent with this solution, the medical profession should reexamine its techniques for obtaining doctor-patient rapport, as well as its awareness of the potential pyschological and short-term physical benefits to patient well-being of prescribed physical therapy.

William Riddick Armstrong, Jr.

---

[165] Note, *supra* note 7, at 728-29.

RECENT DECISIONS

TORTS—STRICT LIABILITY IN TORT FOR THE BUILDER-VENDOR FOR PROPERTY DAMAGE CAUSED BY STRUCTURAL DEFECTS

Appellants, remote purchasers of a house and real estate,[1] brought an action in circuit court against the original builder-vendor for damages sustained due to defects[2] in the purchased house. Appellants alleged the defects were caused by appellees' faulty construction of the house's foundation.[3] Recognizing that the doctrine of caveat emptor previously had been followed in real estate transactions, appellants contended the doctrine is no longer applicable and sought to hold appellees liable on the theory of strict liability in tort. Appellees demurred, claiming strict liability in tort is not applicable to a builder-vendor. The trial court sustained appellees' demurrer. On appeal to the Mississippi Supreme Court, *held*, affirmed. Where a remote purchaser of real estate sues the original builder-vendor for damages sustained due to defects in the permanent structure upon the land, the doctrine of strict liability in tort is not applicable and the doctrine of merger operates to preclude liability. *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974).

The doctrine of caveat emptor was firmly established in the common law in the 17th and 18th centuries.[4] In the 19th century caveat emptor's legal prom-

---

[1] The property was conveyed to appellants by appellees' original vendee who had been in possession for 2½ years.

[2] Appellants occupied the premises for 6 months before defects, such as cracks in the floor and walls of the house, began to appear.

[3] Appellants' declaration alleged that an unearthing of the foundation of their house revealed:

> (a) The grade beam was resting on 6 to 8 inches of earth above the piling upon which it was supposed to be resting, and the steel rods in the piling were not tied into the grade beam according to plans and specifications;
>
> (b) The mesh wire designed to reinforce the concrete slab was found to be laying on the ground below the concrete slab instead of being placed in the concrete as required by the plans and specifications; and
>
> (c) The brick walls were not resting on concrete in all areas, but in places had merely been placed on top of 2x4s lying on the ground.

Oliver v. City Builders, Inc., 303 So. 2d 466, 472 (Miss. 1974). The declaration further charged that during construction of the house appellees had exercised "complete and total dominion and control over every facet of construction." *Id.* (emphasis deleted).

[4] Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541, 542 (1961).

Caveat emptor was noticeably absent in the Middle Ages. The dominating influence of the Church would not permit a seller to escape responsibility for the quality of his goods. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1136-41 (1931). The maxim did not appear in print until the 16th century where it was included in a horse-trading discussion. *Id.* at 1164, *citing* FITSHERBERT, BOKE OF HUSBANDRIE § 118 (1534). The case which initially developed the doctrine of caveat emptor was Chandelor v. Lopus, 79 Eng. Rep. 3 (K.B. 1603), where a purchaser brought an action for deceit seeking to recover his losses sustained in the purchase of a worthless stone. The court stated that if the seller had no knowledge of the stone's worthlessness, the purchaser could not recover. The

inence was further enhanced through greater judicial recognition[5] in disputes involving chattels[6] and real estate.[7] Caveat emptor in the purchase of chattels has been rendered virtually obsolete by the recent widespread adoption of the Uniform Sales Act and the Uniform Commercial Code.[8] In addition, recent litigation in many jurisdictions practically has erased the doctrine's significance in real estate transactions where the vendor is also the builder of the home.[9] Builder-vendors have generally been held liable for their defective work following surrender of title and possession under one or more theories: (1) ordinary negligence; (2) warranty; or (3) strict liability.[10] The ordinary negligence theory, which disregards privity, evolved in *MacPherson v. Buick Motor Co.*[11] where the New York Court of Appeals stated that a manufacturer of an article which is "reasonably certain to place life and limb in peril when negligently made" is liable to subsequent purchasers, "irrespective of contract," for injuries resulting from the manufacturer's negligence.[12] Though the *MacPherson* doctrine applied

---

presence of caveat emptor in the common law was also recognized by Lord Coke:

> Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for *caveat emptor* . . . .

1 E. Coke, Commentary upon Littleton § 145, at 102a (19th ed. 1853).

[5] Not until the nineteenth century, did judges discover that *caveat emptor* sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice.

Hamilton, *supra* note 4, at 1186. *See also* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 Cornell L.Q. 835 (1967).

[6] Barnard v. Kellogg, 77 U.S. (10 Wall.) 383 (1870); Wright v. Hart, 18 Wend. 449 (N.Y. Sup. Ct. 1837); Swett v. Colgate, 20 Johns. 196 (N.Y. 1822). In *Barnard* Justice Davis declared:

> Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the states in the Union where the common law prevails, with one exception (South Carolina), sanction it.

77 U.S. (10 Wall.) at 388-89.

[7] *See, e.g.*, Collier v. Harkness, 26 Ga. 362 (1858); Parker v. Moulton, 114 Mass. 99 (1873); Barnard v. Duncan, 38 Mo. 170 (1866).

Caveat emptor was of limited significance in the purchase of new homes during the 19th century. Instead of purchasing a completed new home, most homeowners had their homes built and paid the contractor in installments only upon his satisfactory completion of the various stages in construction. Roberts, *supra* note 5, at 837.

[8] Bearman, *supra* note 4, at 542.

[9] 7 S. Williston, Contracts § 926A, at 810 (3d ed. W. Jaeger 1963). Due to caveat emptor's judicial origin, courts have had little difficulty justifying a restriction of the doctrine's application. *See* Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461, 462 (1970).

[10] *See* W. Prosser, Law of Torts §§ 95-98 (4th ed. 1971); 1 CCH Prods. Liab. Rep. ¶¶ 1000, 1500, 4000 (1974); 8 Duquesne L. Rev. 407, 410 (1970). Courts traditionally have little difficulty imposing liability under an express warranty theory. *See, e.g.*, Fred J. Miller, Inc. v. Raymond Metal Prod. Co., 265 Md. 523, 290 A.2d 527 (1972); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

[11] 217 N.Y. 382, 111 N.E. 1050 (1916).

[12] 111 N.E. at 1053. *Cf.* Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852)

strictly to chattels, various jurisdictions have extended the doctrine to real property transactions.[13] As courts sought to invoke liability on the basis of an implied warranty, they were confronted with the concept of merger.[14] Strict adherence to the merger doctrine resulted in continued application of caveat emptor.[15] The significance of merger declined as courts recognized that its foundation—the premise that people engaged in arm's length bargaining are capable of looking after themselves[16]—was no longer accurate in today's complex society.[17] In *Miller v. Cannon Hill Estates, Ltd.*[18] implied warranty was developed

---

(privity not required when product was dangerous drug labeled as fit for human consumption). The privity of contract notion originated from dictum in Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), where Lord Abinger stated:

> Unless we confine the operation of such contracts as this [between defendant and plaintiff's employer] to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

152 Eng. Rep. at 405.

[13] The express extension of *MacPherson* allowed parties not in privity with the contractor to recover for personal injuries sustained due to negligent construction or installation of an inherently dangerous instrumentality by the contractor. *See* Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948); Dow v. Holly Mfg. Co., 49 Cal. 2d 720, 321 P.2d 736 (1958); Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

Mississippi was not among those jurisdictions which readily extended the *MacPherson* doctrine. It was 1966 before Mississippi expressly repudiated the privity requirement. In State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), the Mississippi Supreme Court expressly overruled Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928) (no right of action in absence of privity), in holding "privity of contract is not essential in a suit by the consumer against the manufacturer . . . ." 189 So. 2d at 118. In essence the court bypassed the application of *MacPherson* in *State Stove* in recognizing the applicability of strict liability in tort. It should be noted, however, that the manufacturer was not actually held strictly liable for the product which was substantially altered before reaching the consumer.

Before courts deemed it proper to extend *MacPherson* to the builder-vendor, liability was imposed under other theories. *See, e.g.*, Davey v. Turner, 55 Ga. App. 786, 191 S.E. 382 (1937) (contractor's installation of gas heater without vent created nuisance per se); Grodstein v. McGivern, 303 Pa. 555, 154 A. 794 (1931) (contractor's knowledge of occupant's ultimate use of porch railing demanded contractor exercise reasonable care).

[14] It is generally true that any express agreements in regard to land contained in a contract to sell it are merged in the deed if the purchaser accepts a conveyance. If, indeed, the vendor has made misrepresentations, even innocently, rescission is possible in most jurisdictions, but no remedy is generally available for any breach by the vendor of any promise contained in the contract but omitted in the deed.

4 S. WILLISTON, CONTRACTS § 926, at 2603-04 (rev. ed. S. Williston & G. Thompson 1936).

[15] *See, e.g.*, Berger v. Burkoff, 200 Md. 561, 92 A.2d 376 (1952); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959). Such cases reflect an adherence to the views of Professor Williston. See note 14 *supra*.

[16] Roberts, *supra* note 5, at 857. This relationship is also generally regarded as the basis for caveat emptor. *See* Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461, 462 (1970).

[17] *See* Caporaletti v. A-F Corp., 137 F. Supp. 14, 16 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957). *But see* Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (1951).

by the King's Bench. There, it was stipulated in dictum that where a purchaser contracts with a builder to buy a home under construction, an implied warranty exists that the house is to be built in an efficient and workmanlike manner.[19] The distinction between finished and unfinished homes was abolished in *Carpenter v. Donohoe*.[20] The *Carpenter* court stated that the distinction was without reasonable basis and the implied warranty of fitness that a home is to be constructed in a workmanlike manner and suitable for habitation applied to finished homes as well as unfinished homes.[21] Contrary to liability based on negligence as seen in *MacPherson*, builder-vendor liability predicated on im-

---

In *Levy* the court clearly stated the rationale behind the application of merger:

> [T]he policy reasons underlying the rule that the acceptance of a deed without covenants as to construction is the cut-off point so far as the vendor's liability is concerned, are rather obvious. . . . Real estate transactions would become chaotic if vendors were subject to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability. The rule [caveat emptor and merger] which we impose in the circumstances of the present action works no harshness on purchasers of real estate. Plaintiffs [purchasers] had an opportunity to protect themselves by extracting warranties or guaranties from defendant in the contract of sale and by reserving them in the deed. This is not an uncommon practice, and when pursued allows both vendor and purchaser to know the nature and extent of their rights and liabilities and to order their affairs accordingly.

134 A.2d at 719-20; *accord*, Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963).

Mississippi has also recognized merger's applicability in real estate transactions. *See* Mississippi State Highway Comm'n v. Cohn, 217 So. 2d 528 (Miss. 1969) (landowner's right to force state construction of cattle underpass denied since omitted in deed of conveyance); West v. Arrington, 183 So. 2d 824 (Miss. 1966) (conveyance of mineral rights). Mississippi rulings on merger do not directly treat the implied warranty of fitness concept as seen in *Levy* or as presented in the instant case. *But cf.* note 21 *infra*.

[18] [1931] 2 K.B. 113.

[19] *Id.* at 122; *accord*, Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958); *see* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).

[20] 154 Colo. 78, 388 P.2d 399 (1964).

[21] 388 P.2d at 402; *accord*, Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

Prior to the instant case, Mississippi's attitude toward an implied warranty in real estate was not clear. In Corley v. Reed, 164 Miss. 678, 145 So. 241 (1933), the Mississippi Supreme Court held caveat emptor applicable where vendor and vendee had equal opportunities for examination. The court further stipulated, however, that where a purchaser could not verify a seller's representations, he was entitled to rely upon them. *Id.* at 690, 145 So. at 243. *See also* Brown v. Ohman, 42 So. 2d 209 (Miss. 1949); Reed v. Charping, 207 Miss. 1, 41 So. 2d 11 (1949). These cases include representations made by the seller and are not truly applicable in a narrow sense to the implied warranty of fitness concept. In Mincy v. Crisler, 132 Miss. 223, 96 So. 162 (1923) the court held it was error to direct a verdict in favor of a vendor where a reasonable inspection by the purchaser would not uncover the defects. *Id.* at 238, 96 So. at 163. The court made no direct reference to the existence of an implied warranty. *Mincy*, coupled with *Corley*, could support an interpretation that Mississippi recognizes an implied warranty between builder-vendor and original vendee for latent defects.

plied warranty has generally been held to apply only to those persons in privity with the builder-vendor.[22] In *Schipper v. Levitt & Sons*,[23] the New Jersey Supreme Court sought to modify this privity requirement as it equated implied warranty with strict liability and emphasized the previous abandonment of privity in other areas:

> [I]t seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirement of privity, which is fast disappearing in the comparable products liability field, to preclude a similar right in other occupants likely to be injured by the builder vendor's default.[24]

Despite its rather casual equation of implied warranty with strict liability, the New Jersey court's reference to products liability is indicative of the inclination of some jurisdictions to impose liability under this theory.[25] A solid foundation

---

[22] *See, e.g.*, Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971) (implied warranty held to apply prospectively); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922, 923 (1970); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

[23] 44 N.J. 70, 207 A.2d 314 (1965).

[24] 207 A.2d at 328.

In *Schipper* the plaintiff, lessee of defendant's original vendee, was severely burned by scalding faucet water as a result of defendant's negligence. The court's finding the defendant liable under the *MacPherson* doctrine (the condition created was sufficiently dangerous), as well as under implied warranty or strict liability, exemplifies the practical relationship of these theories under which a builder-vendor may incur liability. The court's equation of implied warranty and strict liability is confusing as the doctrines generally are not regarded as synonymous. The overwhelming consensus is that the court applied strict liability in tort. *Cf.* Sales, *An Overview of Strict Liability and Its Effects on Property Damage*, 41 INS. COUNSEL J. 288, 298 (1974); 8 DUQUESNE L. REV. 407, 418-19 (1970).

[25] The general concept of strict liability can be seen as early as the 13th century when the passage of certain English criminal statutes indicated that a special responsibility was placed on manufacturers of food and drink. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103 (1960). American courts also have deemed it proper to place greater burdens on manufacturers of food and drink. *See, e.g.*, Mid-South Packers, Inc. v. Gould, 263 So. 2d 785 (Miss. 1972) (strict liability in tort); Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961) (implied warranty without privity); Moses v. Mead, 1 Denio 378, 43 Am. Dec. 676 (N.Y. 1845) (purchase must be for consumption and not resale); Van Bracklin v. Fonda, 12 Johns 468, 7 Am. Dec. 339 (N.Y. 1815) (liability for direct sales to consumer); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913) (implied warranty exists regardless of privity). Additional recognition of strict liability's virtues was evidenced by an extension of the doctrine to makers of products for external personal use. *See, e.g.*, Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961) (detergent); Patterson v. George H. Weyer, Inc., 189 Kan. 501, 370 P.2d 116 (1962) (hair wave); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958) (permanent wave solution). Such cases, holding manufacturers of food, drink, and products for external personal use strictly liable, set the stage for the landmark decisions of the 1960's which further expanded the concept of strict liability. *See, e.g.*,

for the imposition of strict liability in tort and its ultimate widespread growth was laid in *Henningsen v. Bloomfield Motors, Inc.*[26] where the New Jersey Supreme Court, employing a "warranty" concept, held a defective automobile's manufacturer liable for the driver's injuries without a finding of negligence or a requirement of privity.[27] Strict liability in tort truly became a reality following *Greenman v. Yuba Power Products, Inc.*[28] The imposition of strict liability in tort on the builder-vendor, however, has been one of limited scope. In *State Stove Manufacturing Co. v. Hodges*[29] the Mississippi Supreme Court, recognizing the presence of liability founded upon negligence, also held the contractor strictly liable in tort for property damage sustained when an electric water heater improperly installed by the contractor exploded. The court based its holding on an application of section 402A of the *Restatement (Second) of Torts*.[30] *State Stove* represents a distinct group of cases where strict liability in

---

Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). Prior to the 1960's when courts began using strict-liability-in-tort terminology, liability without privity was imposed under a theory of "warranty." W. PROSSER, *supra* note 10, § 98.

[26] 32 N.J. 358, 161 A.2d 69 (1960).

[27] 161 A.2d at 77, 100.

[28] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (manufacturer of power saw held strictly liable for injuries resulting from defective saw). General construction of the developing theory of strict liability in tort by courts was aptly stated by the California Supreme Court in *Greenman*:

> [S]trict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, [but] the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . ., and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

Mississippi has followed the *Greenman* rationale and imposed strict liability in tort on manufacturers of products. *See, e.g.*, Early-Gary, Inc. v. Walters, 294 So. 2d 181 (Miss. 1974); Ford Motor Co. v. Matthews, 291 So. 2d 169 (Miss. 1974), *noted in* 45 MISS. L.J. 1287 (1974).

There are three generally recognized elements of a cause of action in strict liability in tort: (1) The product was defective when it left control or custody of the supplier, (2) the defective condition rendered the product unreasonably dangerous, and (3) the product was the cause of plaintiff's injuries or damages. Sales, *supra* note 24, at 289; *see, e.g.*, Early-Gary, Inc. v. Walters, *supra*, at 186; Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 313 (1965).

[29] 189 So. 2d 113 (Miss. 1966), *noted in* 38 MISS. L.J. 341 (1967).

[30] RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

> *Special Liability of Seller of Product*
> *for Physical Harm to User or Consumer*
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and

tort has been imposed upon a builder-vendor for his faulty installation of a manufactured product.[31] Though strict liability has been applied under these limited circumstances, the unrestricted imposition of strict liability in tort on a builder-vendor is not yet a reality.[32]

In the instant case, the court found that since previous departures from caveat emptor in other cases rested upon circumstances which did not directly correspond with the present situation,[33] these holdings were not persuasive. The court reasoned that the application of strict liability in tort to a dwelling would

---

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In adopting section 402A the court stipulated that the rule "does not preclude liability based upon the alternative ground of negligence of the manufacturer or seller, where such negligence can be proved." 189 So. 2d at 118. *See also* Webb v. Zern, 422 Pa. 424, 220 A.2d 853, 854 (1966) (section 402A applied to damages sustained from beer keg explosion).

[31] *Accord*, Stuart v. Crestview Mut. Water Co., 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (2d Dist. Ct. App. 1973); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 107, 74 Cal. Rptr. 749 (1st Dist. Ct. App. 1969); *see* Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (2d Dist. Ct. App. 1969) (improper grading caused rear slope of lot to collapse, court drew analogy between grading and the manufacturing process).

[32] Rejection of an unrestricted application to builder-vendors has been based on distinctions between manufacturers of products and builders of homes: (1) builders and contractors seldom can limit their liability by expressed warranties and disclaimers; (2) the home purchaser has less difficulty tracing the source of the defect to the builder or contractor as compared to the average consumer; and (3) there is more opportunity to make a meaningful inspection of retailed products than of a newly purchased residence. Halliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267, 271 (5th Dist. Ct. App. 1966); *accord*, Connelly v. Bull, 258 Cal. App. 2d 183, 65 Cal. Rptr. 689, 696 (1st Dist. Ct. App. 1968) (laws governing sale of commercial products developed along completely different lines than those of property and cannot be equated); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179, 1182 (1972); *see* Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (1957).

The rejection of caveat emptor and utilization of implied warranty or strict liability as a means of imposing liability on builder-vendors largely has involved builder-vendors whom the courts have characterized as "mass producers" of homes. The greater capacity to bear the loss, Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), the lack of a meaningful distinction between the mass production and sale of homes and that of automobiles, Kreigler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1st Dist. Ct. App. 1969), and the presence of unequal bargaining power, Bethlahmy v. Bechtell, 91 Idaho 55, 415 P.2d 698 (1966), all have aided the courts in justifying the imposition of liability on a builder-vendor.

[33] Oliver v. City Builders, Inc., 303 So. 2d 466, 467 (Miss. 1974). The court divided the authorities advocating departure from caveat emptor into two major categories: (1) Cases involving an implied warranty where the builder-vendor conveys directly to the vendee; and (2) cases where damage or injury results from the builder-vendor's installation of a defective product (such as water heater, air conditioner, or furnace) or his improper installation of the product.

require its application to all structures erected upon land and would allow a remote vendee to recover for defects in workmanship or materials which the original vendee accepted.[34] On this basis, the court refused to apply strict liability in tort and distinguished a structure erected upon land from a manufactured product to which the doctrine properly applied.[35] The court further found that, even though Mississippi seems to recognize merger and not implied warranty, if an implied warranty were said to exist between a builder-vendor and his original vendee, no basis exists for an extension of this warranty to a remote purchaser.[36]

In a lengthy dissent, Justice Robertson[37] emphatically denied the applicability of caveat emptor to all sales of real property and the need for privity of contract between the builder-vendor and the homeowner. Basing his denials upon his interpretation of existing Mississippi law as formulated in earlier decisions, Justice Robertson stated that caveat emptor was abandoned by Mississippi in *Mincy v. Crisler*[38] and that *State Stove* disposed of the privity requirement. Citing cases where the court had previously employed strict liability in tort,[39] Justice Robertson concluded that the court must either reverse these earlier decisions which would result in a retreat to the period before *State Stove* or reverse the trial court's holding.

Caveat emptor is a doctrine of judicial origin whose applicability is thus determined by the judicial system which created it. The majority of jurisdictions have departed from the application of caveat emptor to sales of real estate by the builder-vendor in favor of the enforcement of an implied warranty.[40] Courts have correctly based this departure on a recognition of the circumstances surrounding the purchase of a home. Recognizing the complexities of a modern home, the magnitude of the investment, the average home buyer's inexperience, and the assumed expertise of the builder-vendor, courts have reasoned the application of caveat emptor in these instances would be a manifest denial of justice.[41] Where liability has been imposed on the builder-vendor through recog-

---

[34] *Id.* at 468.

[35] *Id.* at 468-69.

[36] *Id.* at 469. Justice Inzer, joined by Presiding Justice Rodgers and Justices Patterson, Walker, and Broom specially concurred, stating that caveat emptor was not applicable and that an implied warranty does exist between a builder-vendor and the *first* purchaser. *Id.* at 469-70.

[37] Joined by Chief Justice Gillespie and Justice Sugg.

[38] 132 Miss. 223, 96 So. 162 (1923) (caveat emptor does not apply to latent defects).

[39] Early-Gary, Inc. v. Walters, 294 So. 2d 181 (Miss. 1974) (bottler strictly liable for injuries caused by defective bottle); Ford Motor Co. v. Matthews, 291 So. 2d 169 (Miss. 1974) (manufacturer of tractor strictly liable for injuries caused by defective safety switch); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973) (heating contractor strictly liable where humidifier installed causes property damage); Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969) (pickup truck manufacturer strictly liable for latent defect in steering mechanism and chassis assembly of truck); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966) (builder strictly liable for faulty installation of water heater).

[40] See note 9 *supra*.

[41] *E.g.*, Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698, 710 (1966); *see* 8 DUQUESNE L. REV. 407, 414 (1970).

nition of an implied warranty, the injured party permitted to recover generally has been the builder-vendor's first purchaser.[42] The instant decision is an example of the denial of relief to a remote purchaser. Though the majority opinion implied caveat emptor is still applicable, meaning there was no implied warranty between a builder-vendor and the original purchaser, the court noticeably emphasized the lack of privity between the parties in denying the purchaser recovery. Though primarily discussed by this court in the context of an implied warranty, this concept is directly related to strict liability in tort where privity is not required. The court, in essence, stated that if the builder-vendor impliedly warrants to the original purchaser that the structure will be fit for habitation, there is no logical basis to assert that the builder-vendor does so for others who may subsequently inhabit the dwelling. It would seem that where an original occupant had a remedy for injuries sustained due to certain defects, a subsequent occupant should not be denied a remedy for similar injuries simply because he is not in privity or is termed a remote purchaser.[43] If the rationale behind this thinking lies in the "remoteness" of the purchaser, the court should not deem this consideration controlling. Elements of a cause of action in strict liability in tort do exist which preclude the imposition of liability on the builder-vendor without good reason;[44] the abdication of the requirement of privity does not result in absolute liability. The court in the instant case chose to disregard the holdings of other cases where strict liability in tort was applied since these holdings were not the direct result of a fact situation identical to the present case. The instant court, as have other jurisdictions, drew artificial distinctions between a structure erected upon land and a manufactured product. Strong arguments for extending strict liability to the builder-vendor can be made through comparing the builder-vendor with the manufacturer of a product. The constructed house is the builder-vendor's manufactured product which when defectively constructed can become an unreasonably dangerous instrumentality. Further, the builder-vendor should bear the loss instead of the innocent purchaser. Evidently, the instant court felt that such assertions as these are not of sufficient validity or strength, for it concluded strict liability in tort was properly applied to manufactured products but not to structures erected upon land. The purpose of strict liability in tort has been said to be

> to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons . . . .[45]

Under strict liability in tort a remote purchaser conceivably could recover even though the original purchaser could not. Also, the distinctions drawn between structures erected upon land and manufactured products do possess some merit.[46] These factors, when viewed with the purpose of strict liability in tort,

---

[42] See note 22 *supra*.
[43] *See* Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314, 328 (1965).
[44] See note 28 *supra*.
[45] Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 312 (1965).
[46] See note 32 *supra*.

do not justify a refusal to apply strict liability. The present case can be interpreted as meaning the countervailing considerations outweigh those analogies which would result in the application of strict liability in tort to the builder-vendor. The special concurrence in the instant case clearly indicates an implied warranty, which is in no way restricted by the doctrine of merger, exists between a builder-vendor and the original purchaser. As a result, this decision presumably recognizes a cause of action by an original purchaser against his builder-vendor for damages caused by structural defects. In abandoning caveat emptor the concurring majority emphasize transformation which society has undergone since caveat emptor's conception. Today's mobile society demands the imposition of strict liability in tort. The well-reasoned dissent contends that the time has arrived for the builder-vendor to be covered by strict liability. In noting the course that Mississippi law has taken over the past 8 years, the tenor of the dissent creates the impression that, even though denied in the instant case, strict liability in tort for the builder-vendor will become a reality. Since the majority did not overrule previous Mississippi decisions which applied strict liability in tort, one must conclude that this decision presently limits the doctrine's application to the areas dealt with in those decisions.[47] Through its strict limitation of existing legal precepts, the court encourages a remote purchaser to pursue other possible legal remedies.[48] At the same time, the instant decision, as evidenced by the special concurrence and particularly the dissent, does not preclude recognition by a responsive judiciary of the need to expand further a rapidly developing area of tort liability.

Paul Houston Stephenson III

---

[47] See note 39 *supra*.

[48] *E.g.*, an action in negligence.

LABOR LAW—EMPLOYER'S DUTY TO BARGAIN ON THE BASIS OF AUTHORIZATION CARDS—UNION HAS THE BURDEN OF SEEKING AN NLRB ELECTION

Plaintiff union[1] sought a National Labor Relations Board [NLRB] bargaining order against defendant Linden Lumber Division, Summer & Co., alleging that Linden had violated the duty to bargain imposed under section 8(a)(5)[2] of the National Labor Relations Act [NLRA][3] by refusing to recognize the union when presented with authorization cards[4] signed by a majority of Linden's employees. The union contended that sections 8(a)(5)[5] and 9(a),[6] as enacted by Congress and interpreted by the NLRB and the courts, impose a duty upon an employer to bargain whenever the union presents "convincing evidence of majority support."[7] They submitted that such evidence had been supplied by the presentation of union authorization cards and a recognitional strike actively supported by a majority of the employees.[8] Linden contended that in the ab-

---

[1] Truck Drivers Union Local No. 413, affiliated with the Teamsters Union, filed an unfair labor practice charge against defendant. Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971), *rev'd sub nom.* Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429 (1974).

[2] (a) It shall be an unfair labor practice for an employer—

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a) (1970).

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Id. § 159(a).

[3] *Id.* §§ 151-88.

[4] An authorization card is a printed form with appropriate blanks for the employee's name and/or signature, employer's name, and date. An authorization card may serve one or more purposes. It may give the union authority to represent the employees in collective bargaining or it may be a "dual purpose" card, giving the union authority to represent the employees and to petition for an NLRB election under section 9(c). *Id.* § 159(c). "Authorization card," as used in this note, means a card giving the union authority to represent the employees in collective bargaining. Some examples of authorization card forms can be found in Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434, 441 (1965). *See also* Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U. CHI. L. REV. 314 (1972); Note, *Union Authorization Cards*, 75 YALE L.J. 805 (1965).

[5] 29 U.S.C. § 158(a)(5) (1970).

[6] *Id.* § 159(a).

[7] Soon after passage of the NLRA, it was recognized that an employer had a duty to bargain whenever the union representative presented such evidence. *E.g.*, NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940); NLRB v. Remington Rand, Inc., 94 F.2d 862, 868 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

[8] The union also contended Linden had reneged on an agreement to abide by a consent election if the union could present a "fresh" showing of a 30-percent support.

sence of employer misconduct which tends to impair the electoral process or any agreement to determine majority status through means other than an NLRB election, an employer is under no duty to recognize a union on any basis other than an NLRB secret-ballot election. The NLRB refused to issue the bargaining order.[9] The United States Court of Appeals for the District of Columbia Circuit reversed and remanded,[10] concluding that the NLRB's refusal to uphold alternative methods to an NLRB election, such as an employer petition for an NLRB election under section 9(c)(1)(B) of the NLRA,[11] was inconsistent with the language and history of sections 8(a)(5) and 9(a) of the NLRA. On certiorari to the Supreme Court, *held*, reversed. An employer that has not engaged in an unfair labor practice which impairs the electoral process does not violate section 8(a)(5) of the NLRA by refusing to recognize a union on any basis other than an NLRB secret-ballot election; a union that is refused recognition despite authorization cards or other evidence of majority support has the burden of petitioning for an NLRB election. *Linden Lumber Division, Summer & Co. v. NLRB*, 95 S. Ct. 429 (1974).

From the enactment of the NLRA in 1935[12] until 1947, section 9 allowed the NLRB to certify a union's majority status by an investigation followed by "a secret ballot of employees, or . . . any other suitable method."[13] Although a union was the only party permitted to petition for an election, such an election was not required, and frequently unions would utilize authorization cards as a means of evidencing majority support.[14] During this same period, in *Franks*

Linden refused to honor the agreement because the 30-percent support included two supervisors who had influenced employees to sign the authorization cards. Linden claimed that recognition on such basis would violate 29 U.S.C. § 158(a)(2) (1970). That section prohibits employer-dominated unions.

[9] Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971), *consolidated with* Wilder Mfg. Co., 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972), *rev'd sub nom.* Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429 (1974). In *Wilder*, the union requested recognition based on authorization cards signed by a majority of employees. Wilder refused recognition and picketing began. The request was renewed but Wilder again denied recognition. Thereupon the union filed unfair labor practice charges against Wilder. A series of NLRB judicial decisions involving *Wilder* is described in the opinion of the court of appeals, 487 F.2d at 1100-03.

[10] Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429 (1974).

[11] Section 9(c)(1)(B) provides for the selection of bargaining representatives on petition of an employer for "an election by secret ballot." 29 U.S.C. § 159(c)(1)(B) (1970). Section 9(c)(1)(A) provides for a similar petition by "an employee or group of employees or any individual or labor organization." *Id.* § 159(c)(1)(A). For a discussion of representational elections under the NLRA, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

[12] Act of July 5, 1935, ch. 372, 49 Stat. 449 (codified in 29 U.S.C. §§ 151-88 (1970)).

[13] Section 9 was amended by the Labor Management Relations Act (Taft-Hartley Act) § 101, 29 U.S.C. § 159 (1970).

[14] *See, e.g.*, Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

Brothers Co. v. NLRB,[15] the Court held that where a union presents authorization cards signed by a majority of employees, and where subsequent employer unfair labor practices erode the union's majority status, the NLRB can issue a bargaining order if only to prevent an employer from profiting by his own violation of the NLRA.[16] In 1947, Congress passed the Labor Management Relations Act (Taft-Hartley Act),[17] amending the NLRA. The House version of section 8(a)(5) would have made an employer's refusal to bargain an unfair labor practice only if the union were already "recognized by the employer or certified as such under section 9."[18] This position was rejected in favor of the broader Senate version which provides that it is an unfair labor practice for an employer to refuse to bargain with the "representatives" of his employees.[19] The Taft-Hartley Act also gave employers the right to petition for an NLRB secret-ballot election under section 9(c)(1)(B).[20] Soon after passage of the Taft-Hartley Act, the Court of Appeals for the District of Columbia Circuit held in *Joy Silk Mills, Inc. v. NLRB*[21] that an employer was under a duty to recognize a union unless the employer had "good faith" doubts about the union's claimed majority status.[22] Similarly, an employer's right to petition for an NLRB election was limited to instances where the employer had good faith doubts that the union represented a majority of the employees.[23] An employer that had no bona fide doubts about the union's claimed majority was compelled to recognize the union or face an NLRB bargaining order[24] for violating the duty to bargain imposed by section 8(a)(5). In most instances, a lack of good faith was shown by the employer's commission of unfair labor practices[25] subsequent to the union's

---

[15] 321 U.S. 702 (1944).

[16] *Id.* at 705.

[17] 29 U.S.C. §§ 141-88 (1970).

[18] H.R. REP. No. 245, 80th Cong., 1st Sess. 30 (1947).

[19] 29 U.S.C. § 158(a)(5) (1970). *Id.* § 159(a) defines "representatives" as those "designated or selected" by a majority of the employees. It fails to specify how the representative is to be chosen.

[20] *Id.* § 159(c)(1)(B) provides a secret ballot election "by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in [section 9] (a) . . . ."

[21] 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), *modifying and enforcing* 85 N.L.R.B. 1263, 24 L.R.R.M. 1548 (1949). The union presented the employer with cards from 38 of 52 employees. The employer refused to allow a neutral party to check the signatures against payroll records. The employer's refusal to recognize the union forced an election which the union lost (32 to 16). The NLRB held that the unfair labor practices and refusal to participate in a card check proved the employer had no good faith doubt about the union's majority status. The refusal to recognize the union thus constituted an 8(a)(5) violation. 185 F.2d at 741.

[22] 185 F.2d at 741.

[23] *Id.* The right to petition was limited so that an employer who had no good faith doubts was not permitted to gain time to dissipate the union's majority by invoking the NLRB's election process.

[24] *See* Franks Brothers Co. v. NLRB, 321 U.S. 702 (1944).

[25] *See, e.g.*, Bernel Foam Prods. Co., 146 N.L.R.B. 1277, 56 L.R.R.M. 1039 (1964); Falstaff Distrib. Co., 104 N.L.R.B. 760, 32 L.R.R.M. 1136 (1953); Dependable Mach. Co., 104 N.L.R.B. 21, 32 L.R.R.M. 1055 (1953). *But cf.* NLRB v. Flomatic Corp., 347 F.2d 74

recognition request. However, bad faith could be shown by an employer's refusal to abide by a prior agreement to determine union majority status through means other than an NLRB election.[26] In both situations, a presumption of bad faith arose and the burden of proving good faith was placed on the employer.[27] The "good faith" test, or *Joy Silk* doctrine, which operated for many years as a per se rule, was clearly a subjective test, requiring a determination of an employer's state of mind at the time of his refusal to bargain.[28] The difficulties encountered in translating the employer's undisclosed state of mind into a legal definition of "good" or "bad" faith eventually led to the development of a more objective test—the independent knowledge test. This rule, developed in a series of NLRB decisions beginning with *Snow & Sons*,[29] states that an employer who refuses a union request for recognition based on an authorization card majority may be subject to an NLRB bargaining order if he had knowledge,[30] independent of the cards, that the union possessed the support of a majority of the employees.

(2d Cir. 1965); Clermont's, Inc., 154 N.L.R.B. 1397, 60 L.R.R.M. 1141 (1965); Hammond & Irving, Inc., 154 N.L.R.B. 1071, 60 L.R.R.M. 1073 (1965). Not every unfair labor practice automatically results in a bargaining order based on cards. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 615 (1969).

[26] Snow & Sons v. NLRB, 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). The NLRB held that a defense of good faith would be unavailing if an employer had refused to bargain while in possession of actual knowledge of the union's majority status. The finding of "independent knowledge" was premised upon the employer's voluntary agreement to have the authorization cards verified by a third party and his continued refusal to bargain once the cards had been verified.

[27] In Aaron Bros., 158 N.L.R.B. 1077, 62 L.R.R.M. 1160 (1966), the burden of proving employer motivation in refusing to bargain was shifted to the NLRB's General Counsel. As the NLRB stated:

> Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority.

Id. at 1078, 62 L.R.R.M. at 1161.

[28] In cases of this type the question of whether an employer is acting in good or bad faith at the time of the refusal is, of course, one which of necessity must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.

Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264, 24 L.R.R.M. 1548, 1550 (1949).

[29] Although the term "independent knowledge" does not appear in the *Snow & Sons* opinion, the decision continually is cited as the source of this doctrine. *See, e.g.*, Truck Drivers Local 413 v. NLRB, 487 F.2d 1099, 1107 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429 (1974); Comment, *supra* note 4, at 320.

[30] *See, e.g.*, Pacific Abrasive, 182 N.L.R.B. 329, 74 L.R.R.M. 1113 (1970) (employer's acknowledgment in discussions with fellow company officers that the union appeared to have a majority and employer's discussions with employees); Snow & Sons, 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962) (verification of authorization cards by third party).

NLRB v. Gissell Packing Co.,[31] in which the NLRB expressly abandoned the *Joy Silk* doctrine,[32] placed added significance on the independent knowledge test. After an analysis of the legislative and judicial history of the NLRA, the Court concluded that a duty to bargain could arise in the absence of an NLRB election[33] and authorization cards generally are sufficiently reliable to provide a valid route for establishing the majority status of a union in instances where a fair election probably could not have been held, or where an election which was held was in fact set aside.[34] But the Court limited the use of an NLRB bargaining order to those situations in which an employer has committed independent unfair labor practices[35] which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside.[36] The result in *Gissell* is substantially in accord with what the NLRB and the courts have been doing for years.[37] In previous decisions, however, the employer's intent was the controlling factor in determining whether a bargaining order was appropriate. Under *Gissell* the employer's action is now the determinative factor. The question expressly left open by the Court in *Gissell* was whether a bargaining order ever is appropriate in cases where the employer has not committed unfair labor practices which tend to preclude the holding of a fair election.[38]

In the instant case, the Court reasoned that since a determination of whether or not an employer has violated section 8(a)(5)[39] of the NLRA would require the NLRB to examine an employer's motive in refusing to recognize a union on the basis of authorization cards, and since an examination of an employer's motive would require the NLRB to reenter the domain of subjective "good faith" inquiries, expressly abandoned by the NLRB and the Court in *Gissell*,[40] an employer does not commit a violation of section 8(a)(5) simply

---

[31] 395 U.S. 575 (1969).

[32] *Id.* at 594.

[33] *Id.* at 595-600.

[34] *Id.* at 601-10.

[35] *Id.* at 595. The Court discussed three general categories of employer misconduct relating to the issuance of a card-based bargaining order: (1) When the employer's misconduct tends to undermine the union's majority and impede the election process, the Board may issue a bargaining order if the union at one time had a card majority. (2) Upon a lesser showing of misconduct, the Board has the authority to issue a bargaining order if the union at one time had a card majority, and the possibility of holding a fair election is slight. (3) Finally, there are instances where the employer's misconduct has only minimal effect on the electoral processes. In such cases, the Board does not have the authority to issue a bargaining order. *Id.* at 614-15.

[36] *Id.* at 614.

[37] *See, e.g.*, Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756 (2d Cir. 1940); NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

[38] 395 U.S. at 601 n.18.

[39] 29 U.S.C. § 158(a)(5) (1970); *see* note 2 *supra*.

[40] 395 U.S. at 594. The NLRB announced at oral argument before the Court that as a result of a gradual shift in NLRB policy during the 1960's the good faith test had been abandoned.

because he refuses to accept evidence of the union's majority status other than the results of an NLRB election.[41] As to an employer's obligation to petition the NLRB for a secret ballot election under section 9(c)(1)(B),[42] the Court concluded that since the legislative history of section 9(c)(1)(B) clearly indicates its purpose is to give an employer, confronted with a union recognition request, the right to have the union's majority status determined by an NLRB election,[43] and since a rule requiring an employer to petition for an NLRB election would be inconsistent with the purpose of section 9(c)(1)(B), a union with authorization cards purporting to represent a majority of the employees has the burden of petitioning for an NLRB election.[44]

Dissenting, Justice Stewart argued that since the NLRA clearly provides that the union may charge the employer with an unfair labor practice under section 8(a)(5) for refusing to bargain collectively with the representatives of his employees, and since the NLRB and the Court consistently have interpreted section 8(a)(5) as imposing a duty upon an employer to bargain whenever the union representative presents convincing evidence of majority support, an employer who refuses to bargain under such circumstances commits a violation of section 8(a)(5).[45] He reasoned that the NLRA does not require that the NLRB define "convincing evidence" in a manner that reintroduces a subjective test of the employer's good faith in refusing to bargain with the union. He further suggested that the NLRB may define "convincing evidence of majority support" solely by reference to objective criteria such as a union-called strike or strike vote or, as in the instant case, by possession of authorization cards signed by a majority of the employees.[46] Although Justice Stewart agreed that it would be improper to impose upon an employer the burden of petitioning for an NLRB election, he contended that an employer, confronted with "convincing evidence of majority support" has the option of petitioning for an election or agreeing to recognize the union on some other basis. If he refuses to exercise this option, however, he must take the risk that his conduct will be found by the NLRB to constitute a violation of his 8(a)(5) duty to bargain.[47]

The collective bargaining provisions of the NLRA reflect two explicit statutory policies: (1) protecting the employees' right to organize and choose bargaining representatives freely; and (2) promoting the practice of collective bargaining.[48] On its face, the instant decision appears to effectuate the first of these policies. Prior to *Linden*, the Board used subjective tests to determine when to issue card-based bargaining orders. Focusing on the employer's motivation in

---

[41] 95 S. Ct. at 432.

[42] 29 U.S.C. § 159(c)(1)(B) (1970).

[43] *See* S. Rep. No. 105, 80th Cong., 1st Sess. 10-11 (1947); 93 Cong. Rec. 3838 (1947) (remarks of Senator Taft).

[44] 95 S. Ct. at 433. Justice Douglas delivered the opinion of the Court, in which Chief Justice Burger and Justices Brennan, Blackmun, and Rehnquist joined. Justice Stewart filed a dissenting opinion in which Justices White, Marshall, and Powell joined.

[45] *Id.* at 435-36.

[46] *Id.* at 436.

[47] *Id.* at 437.

[48] *See* 29 U.S.C. § 151 (1970).

order to determine good faith, those tests effectively ignored the problem of the reliability of authorization cards. Ascertaining an employer's undisclosed state of mind (*i.e.*, "good faith," "independent knowledge") is irrelevant to the determination of the employer's obligation to bargain with a union. The critical issue is whether the employees have freely chosen the union as their bargaining representative. Put in this context, the question becomes whether authorization cards are a reliable indicator of employee sentiment. Patently, they are not. The totally unregulated solicitation of the cards gives rise to serious possibilities of union coercion and misrepresentation.[49] In addition, the NLRA guarantees both union and employer the right to disseminate freely their arguments with regard to unionization.[50] Card drives are often kept secret until a majority has been achieved. This practice circumvents the employer's right to present his arguments against unionization and thus deprives the employees of a truly informed choice. Therefore, to the extent that *Linden* rejects the use of subjective tests and facilitates the ascertainment of employee free choice, it is in accord with the policies of the NLRA. By placing the burden of initiating the petition on the union, however, *Linden* violates the spirit, if not the letter, of the NLRA. As previously noted, it is the express policy of the NLRA to promote collective bargaining. When the union petitions for an election, the employer is free to contest the appropriateness of the union-proposed bargaining unit.[51] By raising serious as well as frivolous objections to the size of the proposed unit, a recalcitrant employer may delay the election for an indefinite time.[52] Indeed, the Court appears to invite the employer to do so since he is not subject to a mandatory bargaining order unless he engages in outrageous and pervasive misconduct which tends to preclude a fair election.[53] Delay does not preclude the holding of such an election. Instead, it merely postpones it. Therefore, it is possible that even a lengthy delay based on insubstantial objections raised by the employer will not be construed as warranting the issuance of a bargaining order. Moreover, if an employer is able to delay long enough, a close union majority could

---

[49] *See* NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565-66 (4th Cir. 1967); NLRB v. S.E. Nichols Co., 380 F.2d 438, 442-44 (2d Cir. 1967); NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 919 (6th Cir. 1965).

[50] 29 U.S.C. § 158(c) (1970) provides:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

[51] Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429, 433-34 (1974).

[52] 29 C.F.R. § 101.20 (1974) orders the regional director of the NLRB to convene a preelection hearing when an election petition presents a question of representation which the employer and union have not agreed to settle by means of a consent election. The regulation, however, contains no deadline for concluding such a preelection hearing. *Id.* §§ 101.17-.21, 102.60-.72. It is therefore entirely possible that questions regarding the size and propriety of the unit could delay the proceeding for a protracted period. Comment, *supra* note 4, at 326.

[53] Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429, 434 (1974).

be dissipated by normal employee attrition.[54] It is at this point that the conventional notions about employer misconduct break down, for there would be no judicially determinable signs of employer misconduct. The employer would have successfully defeated the purposes of the NLRA. Even if this hypothetical abuse never materializes, *Linden* allows an employer to avoid the NLRA. Prior to the enactment of the Taft-Hartley Act, an employer could petition for an election only when two or more unions simultaneously claimed to represent a majority of employees.[55] Since authorization cards could be used for establishing union bargaining rights,[56] an employer faced a double-barreled dilemma when confronted with a single demand for recognition. If the employer recognized a union which did not have majority support, he could be found in violation of the NLRA's "sweetheart provisions."[57] On the other hand, if fear of recognizing a minority union motivated the employer to refuse to bargain with a union in possession of a card majority, he ran the risk of a mandatory bargaining order.[58] The Taft-Hartley Act remedied this situation by granting the employer the right to initiate an election petition whenever there was a "question of representation."[59] The right to petition for an election gave the employer an alternative to immediate union recognition when faced with a card-based demand. *Linden* renders this provision unnecessary, for the employer need respond to a union demand only when that union has been certified by a Board-conducted election. It is submitted that Congress does not intentionally enact useless or superfluous provisions, and that *Linden* erred in placing the burden of petitioning for an election on the union. The collective bargaining provisions of the NLRA support this conclusion. These provisions expressly require an employer to bargain with a union "designated or selected" by a majority of his employees.[60] A literal reading of the same provisions strongly suggests that Congress authorized alternative methods by which a union may activate the employer's bargaining duty; "or" is the language of the alternative, not of the conjunctive. Further, Congress specifically rejected an amendment which would have limited the employer's bargaining duty to a union which had been certified as the result of a Board election.[61] For these reasons, the NLRA's collective bargaining provisions compel the conclusions that an employer is under a duty to bargain when a majority of employees in an appropriate unit choose a bargaining representative and that

---

[54] *E.g.*, Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944) (employer misconduct and employee attrition combined to dissipate union's majority).

[55] Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429, 433 (1974).

[56] NLRB v. Gissel Packing Co., 395 U.S. 575, 597 (1969).

[57] 29 U.S.C. § 158(a) (1970) provides:

(a) It shall be an unfair labor practice for an employer—

. . . .

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .

[58] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 596-98 (1969).

[59] Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429, 433 (1974); 29 U.S.C. § 159(c)(1)(B) (1970).

[60] *See* note 2 *supra*.

[61] NLRB v. Gissel Packing Co., 395 U.S. 575, 598 (1969).

the employees may indicate their choice by means other than a Board-conducted election. Having reached these conclusions, however, one is again confronted with the problem of determining whether the employees have actually chosen a bargaining representative. The instant decision concluded that the secret-ballot election is the sole reliable method for making such a determination.[62] This finding, however, rests upon the fallacious assumption that existing problems inherent in the use of authorization cards are incurable. The deficiencies of the present card system are the end result of the Board's refusal to regulate the manner in which authorization cards are solicited. It is suggested that the following regulatory measures should be initiated: (1) The Board should outlaw the use of the dual purpose card. There are two basic types of authorization cards: an unambiguous card which authorizes the union to act as the employee's sole bargaining agent[63] and the dual purpose card which requests a Board election and authorizes the union to act as the employee's sole bargaining agent.[64] The latter card is often misleading. Moreover, the dual purpose card lends itself to union misrepresentation.[65] Therefore, the unions should be required to use a single purpose card drafted by the Board[66] which clearly authorizes the union to act as the signing employee's sole bargaining agent. (2) Congress should enact a measure which makes employee coercion during a card drive a federal offense.[67] The statute should authorize the Board to prosecute criminally any union solicitor or employer found to be engaging in such a practice. The policy of promoting industrial peace and employee free choice mandates the enactment of such legislation. (3) The Board should require that the

---

[62] Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429, 432 (1974) (by implication). The Court reasoned that since authorization cards are not wholly reliable indicators of employee support, an employer is under no duty to bargain with a union in possession of a card majority until that union has been certified as a result of a Board-conducted election.

[63] *E.g.*, NLRB v. S.E. Nichols Co., 380 F.2d 438, 442 (2d Cir. 1967).

[64] Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318, 326 (1970).

[65] *Id.* at 327.

[66] The Board should require the unions to use the following type of authorization card:

(UNION NAME)

CAUTION: THE ACT OF SIGNING THIS CARD AUTHORIZES THE ABOVE-NAMED UNION TO ACT AS YOUR SOLE BARGAINING AGENT.

I, the undersigned, employee of ..... (Employers Name)
Employed as ..... (Job Title);
Dept. .....;
hereby authorize ..... (Union Name)
to act as my sole representative for the purposes of collective bargaining in accordance with the provisions of the National Labor Relations Act.

(Date) ..... (Social Security No.)
..... (Home Address)
..... (Signature of Employee)

See NLRB v. S.E. Nichols Co., 380 F.2d 438, 442 (2d Cir. 1967).

[67] The only existing remedy is the power of the NLRB to issue a cease and desist order. 29 C.F.R. § 101.12 (1974).

initiation of any card drive be preceded by written notice to the employer. This measure would allow the employer to disseminate freely his views. In addition, it would guarantee a truly informed choice by the employees since they would hear from both the union and the employer. Implementation of these regulatory measures would effectively ensure that a signed authorization card accurately reflects a free, informed employee choice of a bargaining agent. Prior to *Linden*, the Court maintained a delicate balance between the preferred status of the election procedures and the use of authorization cards. By adopting the proposed reforms, the NLRB could restore that balance.

Michael Eugene Earwood
Herbert C. Ehrhardt

CORPORATIONS—STATE REGULATION OF FOREIGN CORPORATIONS—PURCHASE OF COTTON WITHIN STATE BY FOREIGN CORPORATION FOR INTERSTATE SALE CONSTITUTES INTERSTATE COMMERCE

Allenberg Cotton Company, a Tennessee corporation, sought injunctive relief and damages against the appellee, a Mississippi farmer, for breach of a contract to deliver cotton.[1] The contract, arranged by an independent broker in Mississippi,[2] required the appellee to deliver the cotton for the account of Allenberg at a Mississippi warehouse for processing which was necessary for the cotton to be sold in interstate commerce.[3] The appellee contended that since Allenberg was a foreign corporation doing business in Mississippi, its failure to comply with the statutory requirement of obtaining a certificate of authority to do business within the state precluded it from using the Mississippi courts as a forum to enforce a contract arising out of transactions consummated within the state.[4] Allenberg claimed that its business was exclusively interstate in nature; therefore, requiring it to obtain a certificate of authority to conduct its business contravened the commerce clause of the United States Constitution.[5] The Chancery Court of Quitman County entered judgment for Allenberg. The Supreme Court of Mississippi reversed the judgment, holding that Allenberg's activities in Mississippi were wholly intrastate, and therefore Allenberg could be required

---

[1] The contract, executed in January 1971, required the appellee to plant, cultivate, and harvest a crop of cotton on his land, and to have it ginned at a certain company in Mississippi prior to delivering the cotton to Allenberg. The market price for the cotton in the fall of 1971 exceeded the contract price, and the appellee refused to make delivery. Allenberg then brought suit on the contract. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

[2] Allenberg had arranged with a Mississippi cotton buyer to contract cotton to be produced the following season by farmers in Quitman County, Mississippi. Although the buyer had acted for other companies in the past, in 1971 he acted exclusively for Allenberg and made over 20 similar contracts with other farmers covering 9,000 acres in this one county. *Id.* at 23-24, 34-35.

[3] Upon delivery of the cotton to the warehouse, the appellee was to be paid, and title would pass to Allenberg. *Id.* at 24, 38. Allenberg had entered into contracts for sale of the cotton to customers outside of Mississippi in quantities approximating the expected yield of the appellee's contract and its other Mississippi contracts. *Id.* at 26-27. The processing at the warehouse included sorting and classification of the cotton into grades designed to provide each customer with the particular grade specified in the contract of sale. *Id.* at 25-26.

[4] MISS. CODE ANN. § 79-3-247 (1972) provides in part:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

[5] The commerce clause vests exclusive power in Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

to qualify to do business in the state.[6] On appeal to the United States Supreme Court, *held*, reversed. Where a foreign corporation's activities within a state are limited to contracts to purchase cotton which are arranged by an independent broker and to processing of the cotton necessary to its sale in interstate commerce, the corporation is engaged solely in interstate commerce and is not subject to that state's qualification statute. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

The policy that allowed any state to reserve the right to bar nonresidents from doing business within its boundaries originated prior to the time of the Articles of Confederation, when this country was without a central government.[7] The poor condition of American commerce and increasing trade rivalries between the states, both caused by this policy, were primary reasons for the Constitutional Convention.[8] By granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"[9] the framers of the Constitution hoped to put an end to hostile state restrictions and retaliatory trade regulations.[10] Despite this grant of power to Congress, a variety of restrictions have been developed by the states which require outsiders to conform with numerous local regulations before doing business within the state. These local regulations are primarily aimed at foreign corporations.[11] The most common requirement is that a nonresident corporation must obtain a certificate of authority before transacting business within the state.[12] Such a requirement is designed to facilitate service of process, to provide

---

[6] The Supreme Court of Mississippi based its conclusion on the fact that upon delivery of the cotton to the warehouse the farmer was to be paid and title would pass to Allenberg. The court stated:

> The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.

Pittman v. Allenberg Cotton Co., 276 So. 2d 678, 681 (Miss. 1973), *rev'd*, 419 U.S. 20 (1974).

[7] Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925).

[8] *See generally* P. BENSON, THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970 (1970).

[9] U.S. CONST. art. I, § 8. Commonly called the commerce clause, this provision became the foundation for the doctrine of freeing interstate commerce from unreasonable burdens imposed by the states. *See generally* T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 142-79 (1956); Anderson, *State Regulation of Interstate Commerce*, 61 DICK. L. REV. 1 (1956).

[10] *See* Baxter, *Forward* to P. BENSON, *supra* note 8, at xi.

[11] Isaacs, *supra* note 7, at 1018.

[12] All states have some type of qualification statute. Although the requirements vary among the states, naming an agent, filing certain corporate information, and paying fees are the most prevalent. For a general discussion of state requirements, see 1 P-H CORP. ¶ 7101 (1973). Mississippi's requirements include the filing of certain information with the secretary of state, the payment of a fee ranging between $25 and $500 depending on the amount of stated capital of the foreign corporation, and the naming of an agent for service of legal process. MISS. CODE ANN. § 79-3-211 to -251 (1972).

information for the assessment and collection of state taxes, and to provide corporate information to ensure the business is financially responsible.[13] The state's power to require registration is based on Supreme Court decisions holding that since a corporation has no legal existence beyond the state of incorporation,[14] and is not a citizen within the privileges and immunities clause of the Constitution,[15] a state has the general power to exclude foreign corporations or to place conditions on their entry into the state.[16] The Supreme Court soon established, however, that such a requirement could not be applied to a corporation engaged exclusively in interstate commerce without violating the commerce clause.[17] Ascertaining whether or not the corporation was involved in interstate commerce and, therefore, that it was immune from registration requirements became the critical issue in cases involving qualification statutes.[18] In *International Textbook Co. v. Pigg*,[19] the Court used a different test to determine whether a state qualification statute was applicable to a foreign corporation soliciting orders in the state. The Court stated that it must first be established that the corporation was doing business in the state before the corporation's activities could be labeled either interstate or intrastate.[20] If the corporation was

---

Penalizing foreign corporations which fail to comply with qualification statutes by denying them access to the state's courts is common statutory practice. Most states allow a foreign corporation to qualify after the initiation of a suit in order to avoid dismissal. Mississippi, however, does not allow subsequent qualification, and any action brought by the corporation is automatically dismissed from the state courts. Only five other states have identical sanctions. ALA. CODE tit. 10, § 21(89) (Cum. Supp. 1973); ARIZ. REV. STAT. ANN. § 10-482 (1956); ARK. STAT. ANN. § 64-1202 (1966); VT. STAT. ANN. tit. 11, § 2120 (1973). This penalty is applied in Montana by case law. Note, *Right of a Foreign Corporation to Sue upon Contracts in Montana Courts*, 26 MONT. L. REV. 218 (1965). 1 P-H CORP. ¶ 7103 (1973) charts the various penalties imposed by the states. *See generally* Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation, 63* COLUM. L. REV. 117 (1963); Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 IND. L.J. 358 (1958); Note, *The Legal Consequences of Failure to Comply with Domestication Statutes*, 110 U. PA. L. REV. 241 (1961).

[13] Early qualification statutes sought to prevent foreign corporations from competing with local concerns in certain businesses. *See, e.g.*, Railway Express Agency, Inc. v. Virginia, 282 U.S. 440 (1931); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). Such statutes today, however, are generally for the purposes noted. *See generally* Note, *Right of a Foreign Corporation to Sue upon Contracts in Montana Courts, supra* note 12; Comment, *The Lilly Case: Dictum, Holding and Finding*, 57 NW. U.L. REV. 306 (1962).

[14] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

[15] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868).

[16] *Id.* at 181.

[17] To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States . . . .

Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[18] Since state qualification statutes are generally expressed as being applicable only to corporations "doing business" within the state, this method of determining the applicability of such a statute has been commonly referred to as the "doing business" test. *See, e.g.*, Comment, *supra* note 13, at 310-12; 15 VAND. L. REV. 650-51 (1962).

[19] 217 U.S. 91 (1910).

[20] *Id.* at 105-06.

doing business in the state, it must then be analytically determined whether or not its activities constituted interstate commerce. Finally, the court must resolve whether the statute in question materially burdens interstate commerce.[21] This test differed from the "doing business" test insofar as it allowed states to regulate interstate commerce as long as such regulation did not burden trade between the states. Despite appearing to countenance limited state regulation of interstate commerce in *International Textbook*, the Court determined the applicability of state qualification statutes in subsequent decisions by using the "doing business" test.[22] The primary area of inquiry in employing this test was determining when a foreign corporation was engaged in interstate commerce. The "current of commerce" theory,[23] which maintained that only Congress could regulate certain local economic activities because they were an integral, inseparable part of interstate commerce,[24] was one result of the Court's efforts to develop cogent distinctions between "interstate" and "intrastate."[25] This theory marked a new, significant extension of the definition of interstate commerce and concomitantly restricted the states' power to regulate foreign corporations. *Dahnke-Walker Milling Co. v. Bondurant*[26] reflected the trend toward more limited state regulation of foreign corporations. There the Court held that the purchase of wheat in one state for shipment to another was a part of interstate commerce, and that the purchasing corporation could not be required to qualify to do business in the state.[27] The reasonableness of requiring a foreign corporation engaged solely in interstate commerce to qualify to do business in a state, a concept first introduced in *International Textbook*, was not considered again by the Court until *Union Brokerage Co. v. Jensen*,[28] which held that a corporation engaged exclusively in interstate commerce could be required to qualify if its business was "localized" within the state.[29] The Court emphasized the state's

---

[21] *Id.* For a discussion of this test, see Isaacs, *supra* note 7, at 1021-23.

[22] Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); Buck Stove & Range Co. v. Vickers, 226 U.S. 205 (1912).

[23] This theory was first developed by the Court in Swift & Co. v. United States, 196 U.S. 375, 399 (1905), which involved the livestock industry, and was later applied to the grain industry in Chicago Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

[24] *See, e.g.*, P. BENSON, *supra* note 8, at 52-54.

[25] One writer contends that narrowing the scope of inquiry to such distinctions encourages judicial arbitrariness. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 648 (1946).

[26] 257 U.S. 282 (1921).

[27] "Such [interstate] commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse." *Id.* at 290. Dahnke-Walker, a Tennessee corporation, purchased wheat raised by a farmer in Kentucky. Payment to the farmer was to be made when the wheat was delivered to a common carrier for shipment to Tennessee. The farmer refused to deliver the wheat, and Dahnke-Walker was prevented from enforcing the contract because it had failed to qualify to do business in Kentucky. The Court held that Dahnke-Walker could not be denied access to state court since the purchase of the wheat was a part of interstate commerce. *Id.* at 292.

[28] 322 U.S. 202 (1944).

[29] Union Brokerage, a North Dakota corporation, brought suit against a former employee for breach of certain fiduciary obligations related to its business. Union Brokerage

legitimate interests in a localized operation, the benefits accruing to the public from qualification, and the minimal burden placed on the corporation.[30] Shortly after *Union Brokerage*, in *Southern Pacific Co. v. Arizona*,[31] the Court decided the constitutionality of a state regulation which limited the length of trains passing through the state by balancing the burdens imposed on interstate commerce against the state's interest in the regulation. Although the state regulation was found to be unconstitutional, the Court appeared to abandon the view that a state could regulate only intrastate commerce. *Southern Pacific* allowed a state to regulate interstate commerce whenever it could demonstrate that its interest in the regulation outweighed the resulting burdens on commercial intercourse between the states.[32] After *Southern Pacific* and other decisions had extended state power to allow corporations engaged exclusively in interstate commerce to be served with legal process[33] and to be taxed,[34] the Court might have been expected to determine the constitutionality of state qualification statutes by balancing national interests against countervailing state interests. In *Eli Lilly & Co. v. Sav-On-Drugs*,[35] however, the Court again based its decision that the corporation was subject to the qualification statute on a finding that the corporation was engaged in intrastate commerce and, through dictum, reaffirmed the immunity of corporations engaged in interstate commerce. In con-

---

conducted a customhouse brokerage business at the Canadian border in Minnesota to represent American importers of Canadian goods in declaring the contents and value of shipments and in advancing tariff payments so that the goods could be cleared through customs. Union Brokerage failed to qualify to do business in Minnesota as required by statute, and therefore the suit was dismissed by the trial court. Although Union Brokerage's activities in Minnesota were limited to imports (interstate commerce), the Court held that it had "localized" its business and could be required to obtain a certificate of authority before maintaining any action in the state courts. *Id.* at 212.

[30] *Id.* at 210.

[31] 325 U.S. 761 (1945).

[32] *Id.* at 770-71. Such a balancing-of-interests test had been used by the Court prior to its decision in *Southern Pacific*. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 117 (1938). Southern Pacific was viewed as firmly establishing the validity of the test. *See* P. BENSON, *supra* note 8, at 245.

[33] *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[34] *See, e.g.*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[35] 366 U.S. 276 (1961). Lilly, an Indiana corporation dealing in pharmaceutical products, brought suit to enjoin Sav-On-Drugs, a New Jersey retailer, from selling Lilly products below the minimum price fixed in contracts with other New Jersey retailers. Lilly's business in New Jersey consisted primarily of shipments to wholesalers from outside the state. Lilly, however, also employed detailmen who promoted its products by visiting pharmacists, hospitals, and physicians. Their efforts were strictly promotional since only wholesalers could accept orders although the detailmen occasionally transmitted orders to wholesalers as a service to a retailer. Lilly had failed to qualify to do business in New Jersey as required by statute and, therefore, the suit was dismissed by the trial court. Although Lilly's only activity within the state was the promotional efforts of the detailmen and the suit concerned Lilly's interstate retail sales, the Court held that Lilly was engaged in intrastate commerce and, therefore, could be required to obtain a certificate of authority before maintaining an action in the state court.

cluding that the corporation was engaged in intrastate commerce, the Court followed *Cheney Brothers v. Massachusetts*,[36] which dealt with state power to tax foreign corporations. The result was criticized[37] because of a general recognition that a greater amount of business within a state is required to compel qualification than is necessary to subject a corporation to state taxation.[38] Although the decision was viewed as a further extension of state power over foreign corporations,[39] due to the blending of taxation and qualification precedents, the Court's reiteration of the immunity of interstate commerce from qualification statutes seemed to limit the extension to broader definitions of intrastate commerce.

In the instant case, the Court found that delivering cotton to the warehouse was necessary to complete the interstate sale[40] and that the cotton was only temporarily stored in the warehouse.[41] The Court, therefore, determined that the cotton was in the stream of interstate commerce.[42] The Court stated that Allenberg's activities were indistinguishable from the activities in *Dahnke-Walker Milling Co. v. Bondurant*,[43] and since its activities were not localized in the state,[44] Allenberg could not be required to qualify to do business in Mississippi. The Court concluded that since Allenberg was not subject to the qualification statute, and since Mississippi could not therefore deny Allenberg access to the state courts, the judgment must be reversed and remanded for proceedings relating to the breach of the contract.[45]

Justice Rehnquist, the lone dissenter, maintained that Allenberg's activities in Mississippi, although part of interstate commerce, were intrastate in nature and, therefore, supplied a sufficient basis for the state to require the corporation to qualify.[46] The dissent contended that the majority ignored Supreme Court decisions holding that a state can require a foreign corporation engaged in a combination of intrastate and interstate commerce, or in interstate commerce which is localized in the state, to qualify to do business. Justice Rehnquist argued that the majority was retreating to decisions made when the test "was to decide whether a subject was or was not interstate commerce; if it was, Congress alone could regulate it, and if not, only the states could."[47] The dissent further maintained that the Court's most recent decisions on state quali-

---

[36] 246 U.S. 147 (1918).

[37] *See, e.g.*, Comment, *supra* note 13; Comment, *Corporate Registration: A Functional Analysis of "Doing Business"*, 71 YALE L.J. 575 (1962).

[38] Isaacs, *supra* note 7, at 1024-25.

[39] The dissenters in *Eli Lilly* viewed this extension of state power as undesirable. The four Justices contended that the majority opinion could be read as holding that corporations engaged solely in interstate commerce could be required to qualify under state statutes. Eli Lilly & Co. v. Sav-On-Drugs, 366 U.S. 276, 288-89 (1961).

[40] Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 30 (1974).

[41] *Id.*

[42] *Id.*

[43] 257 U.S. 282 (1921).

[44] 419 U.S. at 32-33.

[45] *Id.* at 34.

[46] *Id.* at 34-35.

[47] *Id.* at 38-39, *citing* Stern, *supra* note 25, at 648.

fication statutes left the reasoning and holdings of the cases relied on by the majority suspect.[48] Justice Rehnquist emphasized the state's legitimate interest in the qualification statute and the minimal burden that qualifying imposed on interstate commerce.[49] Justice Rehnquist believed that the burden imposed on interstate commerce by a qualification statute should be judged by the measures required to achieve compliance and not by the sanctions imposed for its violation; for this reason, he concluded that the judgment should have been affirmed.[50]

The Supreme Court, in the instant decision, has taken a definite step backwards in its position on state power to require foreign corporations to qualify to do business in the state. In the Court's view, both *Union Brokerage Co. v. Jensen*[51] and *Eli Lilly & Co. v. Sav-On-Drugs*[52] were inapposite. Although a comparison of the facts in *Union Brokerage* with the facts in *Allenberg* suggests that Allenberg's activities in Mississippi were as "localized" as those of Union Brokerage in Minnesota, the Court distinguished *Union Brokerage* on the ground that Allenberg entered the state to conclude a unitary interstate transaction rather than to localize its business in the state. In light of Allenberg's numerous contracts with Mississippi farmers, however, it appears that the Court seized on a spurious distinction. The Court characterized *Eli Lilly* as qualitatively different from the instant case on the basis of its finding that Lilly was engaged in intrastate as well as interstate business in New Jersey. Consequently, New Jersey could require Lilly to qualify to do business within the state. It is maintained, however, that Allenberg's activities in Mississippi are as separable from its interstate trade as were Lilly's promotional activities in New Jersey. The Court ignored the trend toward increased state power to regulate foreign corporations represented by these decisions and instead relied on *Dahnke-Walker Milling Co. v. Bondurant*[53] to support its conclusion that Allenberg was engaged solely in interstate commerce. Although the facts in *Dahnke-Walker* were very similar to the facts in the instant case, the Court's reliance on this decision can be viewed only as a strict limitation of the state's power to require foreign corporations to qualify to do business in the state. Instead of the Court's stated finding that the corporation was engaged solely in interstate commerce, it seems that the result in *Allenberg* was actually based on the penalty Mississippi imposes on nonqualifying corporations—absolute denial of access to state courts. Justice Rehnquist implies that this sanction was the basis of the decision, and an examination of the statutes involved in *Union Brokerage* and *Eli Lilly* tends to substantiate his opinion. In both instances the state qualification statute enabled the foreign corporation to comply after the initiation of an action, thereby avoiding dismissal.[54] The Mississippi statute requires

---

[48] *Id.* at 42.
[49] *Id.* at 40-42.
[50] *Id.* at 41-42.
[51] 322 U.S. 202 (1944).
[52] 366 U.S. 276 (1961).
[53] 257 U.S. 282 (1921).
[54] The statutes of both states prohibit a foreign corporation which has failed to com-

that the corporation qualify prior to the transaction of any business in the state. It does not allow subsequent qualification. This statute has the effect of leaving unqualified foreign corporations without a forum for any claims that arise from business transacted in the state.[55] According to Justice Rehnquist, the sanction imposed for violating a qualification statute should not be considered as a burden on interstate commerce. As a practical matter, however, denial of access to state courts without a provision for subsequent compliance is an unreasonable sanction for noncompliance, and *Allenberg* reflects the Court's determination to protect foreign corporations from state efforts to deprive them of a tribunal to enforce their rights under contracts entered in good faith. In theory, the denial of access to state courts is equitable since a corporation unwilling to accept the burdens prescribed by the state should not be free to enjoy the benefits of transacting business within the state. Furthermore, it is probably the most effective sanction available to the states since, in addition to state officials, citizens of the state have reason to aid in the enforcement of the sanction.[56] Whatever its value in enforcement, however, it does not serve to rectify the damage done by the corporation's failure to qualify. The state's interests in the qualification statute include facilitation of service of legal process,[57] obtaining corporate information to ensure the business is financially responsible,[58] and accurate assessment and collection of state taxes.[59] To deny an unqualified corporation a forum to enforce its claims does not satisfy any of these interests. Moreover, the party who breached the contract and received benefits from that contract is allowed to escape without making any compensation to the foreign

---

ply from maintaining any action in a state court until it has obtained a certificate of authority to do business. MINN. STAT. ANN. § 303.20 (1969); N.J. STAT. ANN. § 14A:13-11 (1969).

[55] Prior to the Court's decision in Woods v. Interstate Realty Co., 337 U.S. 535 (1949), a foreign corporation barred from a state court because of its failure to qualify could seek relief in a federal court on the basis of diversity of citizenship. *Woods* applied the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), to bar the action in the federal court because under state law it was barred in the state court.

[56] One of the most common ways of discovering an unqualified foreign corporation is when a citizen raises the failure to qualify as a defense to an action by the corporation. *See, e.g.*, Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation, supra* note 12, at 126-31.

[57] Although it may be possible for a state to assert jurisdiction over an unqualified foreign corporation on the basis of "minimum contacts," International Shoe Co. v. Washington, 326 U.S. 310 (1945), the appointment of an agent eliminates the necessity of proving the existence of such "minimum contacts" and gives the state automatic jurisdiction over the corporation. *See, e.g., The Supreme Court, 1960 Term*, 75 HARV. L. REV. 138, 140 (1961).

[58] Although the state of incorporation usually requires a corporation to file financial information and to comply with regulation statutes, the immediate availability of the information to state citizens and regulation of the activities within the state are valid reasons for state interest in the statute. *See, e.g.*, Comment, *supra* note 13, at 321-22.

[59] Due to the possibility of satisfying the other two state interests through other means, obtaining information to ensure accurate assessment and collection of state taxes is probably the primary state interest in qualification statutes. *Id.*

corporation. A qualification statute providing for subsequent compliance and monetary penalties consisting of past fees and taxes would retain the benefits of the present statute and would eliminate the burden and inequities from the corporation's inability to enforce its claims. The corporation would be forced to comply with the statute in order to avoid dismissal of its actions in state courts and would be required to pay past fees and taxes before subsequent compliance would be allowed. The only drawback of such a statute is that a corporation, assured of the opportunity to comply before its action is dismissed, may delay obtaining a certificate of authority until it is faced with the necessity of using the state courts. To encourage prompt compliance, Mississippi could assess an additional monetary penalty based on the amount of business illegally transacted in the state.[60] A statute incorporating these provisions would constitute an effective sanction for nonqualified, foreign corporations and should not be struck down as an unreasonable burden on interstate commerce.

Dalton Mounger

---

[60] Such a penalty is utilized in various forms by other states. The penalties used include standard fines for each offense, treble fees for the certificate of authority, and standard amounts for each day or month of noncompliance. For a complete listing of state penalties for noncompliance, see 1 P-H CORP. ¶ 7103 (1973).

CONSTITUTIONAL LAW—JUROR SELECTION—EQUAL PROTECTION DENIED WHEN MASTER GRAND JURY LIST SIGNIFICANTLY UNDERREPRESENTS DEFENDANT'S RACE

In October 1968 R. B. Ford, a Black, was convicted of manslaughter in the Circuit Court of Calhoun County, Mississippi. Prior to trial Ford moved unsuccessfully to quash the indictment, alleging that members of his race had been excluded systematically from the grand jury which indicted him. On appeal the Supreme Court of Mississippi affirmed Ford's conviction, holding that systematic exclusion could not be established solely by evidence that Blacks were unrepresented on a particular grand or petit jury.[1] Petitioner then initiated a habeas corpus proceeding in the United States District Court for the Northern District of Mississippi.[2] At the evidentiary hearing[3] significant new facts were presented which tended to show a long-continued, dramatic underrepresentation of Blacks on Calhoun County grand and petit juries.[4] Claiming that these new facts established a prima facie case of racial discrimination in jury selection, petitioner further contended that the failure of Black citizens to register to vote and, therefore, to qualify for jury service[5] was due to fear and repres-

---

[1] Ford v. State, 227 So. 2d 454 (Miss. 1969). Ford made no effort to show a long-continued practice of exclusion or underrepresentation. Instead, he merely asserted that, while Blacks represented 35 percent of the county population, there were no Blacks on the 75-man venire from which the grand jury was selected. *Id.* at 456.

[2] The proceeding was initiated pursuant to 28 U.S.C. §§ 2241-55 (1970). The district court found that petitioner had sufficiently exhausted available state remedies.

[3] As the United States Supreme Court has made clear, federal courts in habeas corpus proceedings are not bound by the evidentiary record made in state courts; and when state court proceedings have yielded an inadequate factual record, federal courts may seek out additional evidence to secure vindication of petitioner's constitutionally protected rights. . . . Indeed, the federal judiciary is often required in habeas proceedings to consider and act upon evidence which was unavailable or not presented to the state courts.

Ford v. Hollowell, 385 F. Supp. 1392, 1397 (N.D. Miss. 1974).

[4] Petitioner's new evidence concerned:

(1) *The Selection Procedure* — The master jury list was selected at random solely from the voter registration list. Also, the grand jury which indicted the petitioner was selected pursuant to Act of May 7, 1962, ch. 308, § 1, [1962] Gen. Laws Miss. 545, codified as amended at MISS. CODE ANN. § 13-5-1 (1972)), which allowed only adult males to serve as jurors. This law was altered to permit female jurors by Act of June 14, 1968, ch. 335, § 1, [1968] Gen. Laws Miss. 462. On order by the circuit court, all freeholders in the county could have been used as a source for juror selection. Act of June 11, 1964, ch. 327, § 1, [1964] Gen. Laws Miss. 450 (repealed 1974). In Calhoun County, however, no such order had been issued.

(2) *Relevant Statistics* — Adult Black male population of Calhoun County was 19.5 percent in 1960, 18.9 percent in 1968, and 18.7 percent in 1970. Prior to 1964 no Blacks served on juries within the county. From 1960 to 1968, Blacks averaged 4.1 percent of circuit court veniremen and from 1965 to 1968, comprised 7.1 percent. The 1967-1968 master jury list was only 2.5 percent Black. In 1968, registered Black males constituted only 0.5 percent to 1.5 percent of the total male voting population of the county.

[5] See notes 3 & 4 *supra*.

sion, resulting from past discrimination and continuing harassment.[6] Respondent[7] contended that the lack of registration by Black males was not due to discrimination by local officials[8] but that Blacks voluntarily chose not to register. Therefore, respondent argued, unregistered Blacks could not be considered a "cognizable" group[9] to whom fourteenth amendment protection extends. Finding the facts as alleged by petitioner and also finding that Blacks had suffered no official impediment in voter registration,[10] the court *ordered* the writ granted. Although no official discrimination is alleged, when significant numbers of Black residents fail to register to vote due to fear and repression, grand juries selected from voter registration lists are constitutionally infirm. *Ford v. Hollowell*, 385 F. Supp. 1392 (N.D. Miss. 1974).

Racial discrimination in the selection of grand and petit juries has been a legal issue in the United States since adoption of the fourteenth amendment.[11] Systematic exclusion of Blacks from jury service, whether by statute or acts of administrative officials, has consistently been held an unconstitutional denial of a Black defendant's equal protection rights[12] since 1880 and grounds for reversal of a criminal conviction[13] since 1883. Indictment by a grand jury is not constitutionally required in state criminal proceedings;[14] however, if used it must meet the same constitutional standards prescribed for petit juries.[15] While most early jury discrimination cases involved total or substantially total exclusion,[16] courts have long recognized the unconstitutionality of dramatic under-

---

[6] The court noted incidents of church and cross burnings and of shootings into houses.

[7] The original respondent was W. I. Hollowell, acting superintendent of the Mississippi State Penitentiary. He was succeeded as respondent in this action by Jack K. Reed, who is now the superintendent.

[8] Respondent stated that there had been no official discrimination practiced since 1965.

[9] Cases cited note 52 *infra*.

[10] The court noted that a statistically flawless random selection from the total registration list would have yielded a master list only 1 percent Black. Statistical analysis, then, did not evince active official discrimination; however, the court stated that the extent of underrepresentation was known to, or readily ascertainable by, county officials.

[11] The fourteenth amendment was adopted specifically for the purpose of protecting the recently emancipated Black race. Strauder v. West Virginia, 100 U.S. 303, 306-07 (1880).

[12] It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

Id. at 309; *accord, Ex parte* Virginia, 100 U.S. 339 (1880) (discrimination by government officials). The Civil Rights Act of 1875, 18 U.S.C. § 243 (1970), provides criminal penalties for government officials who practice racial discrimination in jury selection.

[13] Bush v. Kentucky, 107 U.S. 110 (1883).

[14] Hurtado v. California, 110 U.S. 516 (1884).

[15] *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972); Whitus v. Georgia, 385 U.S. 545, 549 (1967); Pierre v. Louisiana, 306 U.S. 354, 357 (1939). *But cf.* Cassell v. Texas, 339 U.S. 282, 301 (1950) (dissenting opinion).

[16] *E.g.*, Pierre v. Louisiana, 306 U.S. 354 (1939) (only one Black juror within memory); Norris v. Alabama, 294 U.S. 587 (1935) (no Black juror in preceding 34 years); Strauder v. West Virginia, 100 U.S. 303 (1880) (excluded by statute).

representation,[17] proportional limitation,[18] or token inclusion.[19] Unequal protection is presumed from unequal representation; actual prejudice need not be proved.[20] A defendant, however, may not demand proportional representation of his race or group on a particular jury.[21] Discriminatory jury selection also has been recognized as the basis for a cause of action demanding affirmative relief.[22] The group allegedly discriminated against must be judicially "cognizable" within the community. In *Hernandez v. Texas*[23] the Court stated that "cognizability" was a question of fact and roughly defined the term to mean a significantly large, identifiable class of persons which may be the subject of prejudice.[24] The party attacking the selection process must prove purposeful discrimination; however, a prima facie case[25] of purposeful discrimination arises upon proof of a long-continued, substantial underrepresentation of a cognizable group otherwise qualified for jury service.[26] With the prima facie rule, courts began

---

[17] Whitus v. Georgia, 385 U.S. 545 (1967); Avery v. Georgia, 345 U.S. 559 (1953); United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962).

[18] Cassell v. Texas, 339 U.S. 282, 287 (1950); Akins v. Texas, 325 U.S. 398 (1945).

[19] Cassell v. Texas, 339 U.S. 282 (1950); Smith v. Texas, 311 U.S. 128 (1940). *But cf.* James v. United States, 416 F.2d 467 (5th Cir. 1969) (purposeful inclusion to achieve cross-sectional representation); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967) (purposeful inclusion necessary to empanel constitutional jury).

[20] Peters v. Kiff, 407 U.S. 493, 502-03 (1972); Strauder v. West Virginia, 100 U.S. 303, 309 (1880) (by implication). This principle is evident throughout the juror discrimination cases.

[21] Swain v. Alabama, 380 U.S. 202, 208 (1965); Hernandez v. Texas, 347 U.S. 475, 482 (1954); Akins v. Texas, 325 U.S. 398 (1945).

[22] Carter v. Jury Comm'n, 396 U.S. 320 (1970); Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969); Brown v. Rutter, 139 F. Supp. 679 (W.D. Ky. 1956). For an analysis of the topic, see Comment, *Jury Discrimination in the South: A Remedy?*, 8 COLUM. J. LAW & SOCIAL PROBS. 589 (1972).

[23] 347 U.S. 475 (1954).

[24] *Id.* at 478. In *Hernandez*, the Court examined evidence of communal attitudes, *e.g.*, signs in restaurant windows and on restrooms, to find proof of the existence of a separate class. *Id.* at 479-80. Courts have recognized other improper group exclusions. *E.g.*, Taylor v. Louisiana, 95 S. Ct. 692 (1975) (women); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (daily wage earners); *cf.* United States v. Andrews, 342 F. Supp. 1261 (D. Mass.), *rev'd on other grounds*, 462 F.2d 914 (1st Cir. 1972) (paupers).

[25] *See* Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972); Whitus v. Georgia, 385 U.S. 545, 550 (1967); Labat v. Bennett, 365 F.2d 698, 719 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967). In the absence of a prima facie case, courts have tended to rely on the purposes and standards of the selection system. United States v. Hyde, 448 F.2d 815, 825 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972). This prima facie case may be rebutted by constitutionally acceptable explanations, *see* Brown v. Allen, 344 U.S. 443, 473-74 (1953) (failure to qualify under nondiscriminatory standards); United States v. Hyde, *supra*, at 827 (failure to return questionaire resulted in statutory disqualification); Billingsley v. Clayton, 359 F.2d 13, 23 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966) (good faith affirmative effort by selection officials).

[26] *E.g.*, Whitus v. Georgia, 385 U.S. 545, 550-51 (1967); Hernandez v. Texas, 347 U.S. 475, 480-82 (1954); Norris v. Alabama, 294 U.S. 587 (1935); Witcher v. Peyton, 405 F.2d 725, 730-32 (4th Cir. 1969) (dissenting opinion) (delineating relevant statistics); United

relying more heavily on statistical analysis.[27] Yet, not being based entirely on objective results, past decisions establish no precise guidelines for permissible nonproportionality.[28] Further, in *Peter v. Kiff*[29] the Court disregarded the presumption of prejudice in finding exclusion of a cognizable class of persons from jury service to be an evil in itself.[30] Recently, in *Taylor v. Louisiana,*[31] the Court stated that constitutional standards require that juries be selected from source lists fairly representative of a cross section of the community.[32] While this cross-section requirement may be the present constitutional test, it has not been strictly applied. Past decisions have not relied on statistical proof alone, but also have required evidence of official discrimination.[33] For example, in *Brown v. Allen*[34] use of poll and property tax lists as sources for juror selection significantly excluded poor and Black residents. In refusing habeas corpus relief the Court found the underrepresentation in *Brown* insufficient to invalidate nondis-

---

States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 78 (5th Cir. 1959); Black v. State, 187 So. 2d 815, 816-18 (Miss. 1966).

[27] *E.g.*, Hernandez v. Texas, 347 U.S. 475, 480-81 (1954); Salary v. Wilson, 425 F.2d 467, 470-71 (5th Cir. 1969); Billingsley v. Clayton, 359 F.2d 13, 17 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966).

[28] Alexander v. Louisiana, 405 U.S. 625, 628-32 (1972); Swain v. Alabama, 380 U.S. 202, 205-09 (1965). The disparity in proportions sufficient to establish a prima facie case depends on the selection plan involved. Colson v. Smith, 438 F.2d 1075, 1082 & n.8 (5th Cir. 1971); *see* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); Comment, *The Civil Petitioner's Right to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases Generally*, 20 U.C.L.A.L. REV. 581, 584-600 (1973). Although the Supreme Court has eschewed conscious proportionalism, *e.g.*, Swain v. Alabama, *supra* at 208; Cassell v. Texas, 339 U.S. 282, 287 (1950), cross-section standards necessitate close attention to relative proportional disparities. *See also* United States v. Goff, 509 F.2d 825 (5th Cir. 1975) (20-percent underrepresentation insufficient to establish prima facie case when related to effect on 23-member grand jury).

[29] 407 U.S. 493 (1972).

[30] Although *Peters* was actually a decision on standing under sixth amendment principles, the Court's holding was clearly based on this position. *Id.* at 498-503. Courts and writers have noted that juror discrimination not only prejudices the litigant, but psychologically injures the excluded class and society as a whole. Ballard v. United States, 329 U.S. 187, 195 (1947); Rabinowitz v. United States, 366 F.2d 34, 59-60 (5th Cir. 1966); *see* Comment, *Voter Registration Lists: Do They Yield a Jury Representative of the Community?*, 5 U. MICH. J.L. REFORM 385, 389-90 (1972).

[31] 95 S. Ct. 692 (1975).

[32] *Id.* at 697. The Court cautioned that there is no requirement that juries must "mirror" the community. *Id.* at 702. *Taylor* was decided on sixth amendment principles.

Though, due to chance, a particular jury may not accurately reflect the makeup of the community, impartial selection from representative source lists should average a cross-sectional result.

[33] *E.g.*, Alexander v. Louisiana, 405 U.S. 625, 628-32 (1972); Hill v. Texas, 316 U.S. 400, 404 (1942); Leggroan v. Smith, 498 F.2d 168, 169-70 (10th Cir. 1974).

[34] 344 U.S. 443 (1953).

criminatory use of such lists.[35] Moreover, the Court has consistently refused to declare a system unconstitutional per se.[36] It is not clear whether, on fourteenth amendment grounds, the Supreme Court would charge local officials fairly administering a neutrally intended selection plan with an affirmative duty to compensate for de facto discrimination. The Court has stated that juror selection officials are under an affirmative duty not to discriminate in the selection of jurors on racial grounds.[37] These cases, however, involved selection plans which allowed substantial official discretion, and the facts before the Court strongly implied that intentional discrimination was practiced.[38] Characteristically, then, the Court has required affirmative action only when the particular selection system was initially based on official discretion, not impartial selection from a neutral[39] source list. The Fifth Circuit, which has had considerable experience with juror discrimination cases,[40] has accepted the cross-section test as the constitutional standard.[41] Further, that court has sanctioned positive consideration of race in efforts to meet cross-section requirements.[42] The majority of Fifth Circuit decisions, though, have involved "key man" type selection plans or ones under more rigorous federal standards[43] and therefore may be distin-

---

[35] *Id.* at 474; *accord*, Sam v. State, 310 So. 2d 923 (Miss. 1975) (impartial use of voter registration, homestead exemption, and property tax lists).

[36] Cassell v. Texas, 339 U.S. 282, 283-84 (1950); Smith v. Texas, 311 U.S. 128, 130-31 (1940). *But cf.* Taylor v. Louisiana, 95 S. Ct. 692 (1975).

[37] *See* Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Avery v. Georgia, 345 U.S. 559, 561 (1953).

[38] *E.g.*, Alexander v. Louisiana, 405 U.S. 625, 630-32 (1972); Carter v. Jury Comm'n, 396 U.S. 320 (1970); *see* Leggroan v. Smith, 498 F.2d 168, 170 (10th Cir. 1974).

[39] Neutral is used here to designate a source list that is theoretically open, nonexclusive, and not tainted by acts of official discrimination.

[40] In Colson v. Smith, 483 F.2d 1075, 1082 & n.8 (5th Cir. 1971), the court standardized proof requirements for selection systems involving official discretion. In systems patently conducive to official discrimination, (for example, where racially coded source lists are used) the court stated that proof need only show impermissible disparities between the source and the venire list from which the particular grand jury is drawn. Where coded or segregated rolls are not used, proof must show an impermissible disparity between the source and the master list from which all grand juries are drawn.

[41] *E.g.*, United States *ex rel.* Davis v. Henderson, 474 F.2d 1098 (5th Cir. 1973); Brooks v. Beto, 366 F.2d 1, 10 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). *But cf.* Wright v. Smith, 474 F.2d 349, 353 (5th Cir. 1973) (system based on county tax return list not racially or economically biased). *See also* United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 58-70 (5th Cir. 1962) ("systematic exclusion").

[42] *E.g.*, James v. United States, 416 F.2d 467, 472 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); Baker v. United States, 412 F.2d 1069, 1074 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

[43] "Key man" systems are those in which commissioners or persons whom they select,

guishable from the instant case. Also, decisions reviewing state selection plans which use voter registration lists as juror sources are not conclusive as to the issue of unintentional, de facto discrimination.[44] However, in remanding *United States ex rel. Davis v. Henderson*,[45] the court stated that use of unrepresentative lists as juror selection sources, without more, would justify the requested habeas corpus relief.[46] Decisions of the other circuits have adhered to limits established by the Supreme Court: attacks have been upheld only where selection systems have been found to exclude, not passively fail to include, cognizable groups or where officials have failed to perform affirmative duties under "key man" type plans.[47] Two federal district courts decided cases similar to *Ford v. Hollowell*, but arrived at different conclusions. In *United States v. Briggs*[48] the court reasoned that since substantial numbers of Blacks had registered, the alleged repression did not exist to an impermissible extent. That court, therefore, concluded that unregistered Blacks were not judicially cognizable.[49] In another case under federal selection statutes, a federal district court heard and postponed decision on the issue raised by conflict between a strict cross-section test and impartial use of unrepresentative voter registration lists as juror sources.[50] The court stated, however, that if a defendant has a right to a jury drawn from a source representative of a cross section of the community, then that right should not be "diminished" by either official or unofficial action or inaction.[51]

In the instant decision, the court distinguished cases cited by respondent[52]

---

are asked to suggest persons thought to be suitable for jury service. Comment, *Grand Jury Selection: Voter Registration Lists as a Cross Section of the Community*, 52 ORE. L. REV. 482, 484 (1973); *see* Brooks v. Beto, 366 F.2d 1, 23 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967); Billingsley v. Clayton, 359 F.2d 13, 19 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966). While this writer finds a fundamental difference between "key man" procedures and those in which impartial selections are made from "neutral" source lists, the courts may not choose to recognize this distinction.

Cases decided either under federal statutes or under the supervisory powers of the Supreme Court seem to be distinguishable per se since the courts have required stricter adherence to cross-section principles. *E.g.* Rabinowitz v. United States, 366 F.2d 34, 57 n.58 (5th Cir. 1966).

[44] In Ford v. White, 430 F.2d 951 (5th Cir. 1970), the court did not reach the question of underrepresentation per se. The court primarily focused on proof of official discrimination through objective analysis of the statistics presented. *See* United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 838 (1959) (emphasizing indirect proof of active official discrimination).

[45] 474 F.2d 1098 (5th Cir. 1973).

[46] *Id.* at 1101. Although, as noted, cases may be distinguished on an individual basis, the cumulative message of its decisions indicates that the Fifth Circuit would affirm *Ford v. Hollowell.*

[47] Leggroan v. Smith, 498 F.2d 168 (10th Cir. 1974) (limitation to real property owners is impermissible classification); United States v. Lewis, 472 F.2d 252 (3d Cir. 1973) (by implication); United States v. Parker, 428 F.2d 488 (9th Cir.), *cert. denied*, 400 U.S. 910 (1970) (must show discrimination in compiling source lists).

[48] 366 F. Supp. 1356 (N.D. Fla. 1973).

[49] *Id.* at 1361. The court offered no statistics in its decision. More importantly, the court interpreted the federal statute as prohibiting official discrimination only and not requiring adherence to strict cross-section guidelines. *Id.* at 1358-59.

[50] United States v. Burkett, 342 F. Supp. 1264 (D. Mass. 1972).

[51] *Id.* at 1265.

[52] United States v. Dangler, 422 F.2d 344 (5th Cir. 1970); Camp v. United States, 413 F.2d 419 (5th Cir.), *cert. denied*, 396 U.S. 968 (1969); Grimes v. United States, 391 F.2d

which held that persons who fail to register to vote are not a cognizable group, stating that in those cases, use of voter registration lists produced a fair cross section of the community and none involved exclusion or dramatic underrepresentation of Blacks. The court concluded that it would be "shockingly unfair"[53] to refuse to consider Calhoun County Blacks as cognizable since they had involuntarily refrained from registering. The court rejected the respondent's contention that it was necessary to show official action and found that petitioner's evidence established a prima facie case of purposeful discrimination.[54] The court then concluded that since selection officials had an "affirmative duty"[55] to use a plan capable of producing juries representative of a cross section of the community, and since county officials were charged with knowledge that voter registration lists were unrepresentative, use of these lists as the sole source for juror selection violated defendant's equal protection rights.

Although the instant decision may, to some extent, disrupt existing state juror selection procedures, it does so to the benefit of equal protection principles. Assuming prejudice, the court reasoned that defendant's rights should not be abridged merely because unofficial, rather than official, actions and attitudes caused the disproportionate result. While *Ford v. Hollowell* may be limited to its facts, the court's rationale, carried to its conclusion, should reach the same result even if Blacks voluntarily fail to register to vote. A person's equal protection rights should not be determined by the effects of social pressure or group

---

709 (5th Cir.), *cert. denied*, 393 U.S. 825 (1968); Ford v. White, 299 F. Supp. 772 (S.D. Miss. 1969), *aff'd*, 430 F.2d 951 (5th Cir. 1970).

The court noted that: (1) The registration lists in *Grimes* produced a representative cross section, thus no cognizable group was excluded; also *Grimes* did not involve racial exclusion. (2) *Camp* and *Dangler* considered Jehovah's Witnesses who voluntarily refrained from registering due to religious convictions. The Fifth Circuit made no finding of a lack of a cross section nor the existence of racial exclusion. (3) Although the district court in *White* applied the failure-to-register doctrine, *White* was a class action; also, the Fifth Circuit affirmed on the basis of factual considerations (registration had risen to an acceptable level) rather than on the cognizability issue.

While *Grimes* and *White* present no difficulty and are adequately characterized, the court might have distinguished *Camp* and *Dangler* more effectively. First, to state that a fair cross section was not lacking is to engage in a tautology. A fair cross section is present only when no cognizable group is excluded or dramatically underrepresented. Second, stating that neither case involved racial exclusion does not meet the issue. A group may be judicially cognizable, though not racial. *Camp* and *Dangler*, however, are distinguishable since they attempted to convert persons who failed to register into a cognizable group. Jehovah's Witnesses simply do not meet the *Hernandez* test: they are not a significantly large identifiable group within the community. Additionally, there is no indication that a Jehovah's Witness offers a particularly distinct outlook so that his absence from the juror pool deprives that unit of some substantial area of human experience. On the other hand, Blacks are admittedly cognizable and remain so regardless of whether they choose to register to vote. The concern in *Ford v. Hollowell* was that an already recognized group disproportionately failed to register.

[53] Ford v. Hollowell, 385 F. Supp. 1392, 1399 (N.D. Miss. 1974).

[54] *Id.* at 1399-1400. The court stated: "[O]bjective results largely govern in judging the constitutionality of jury selection methods." *Id.* at 1399.

[55] *Id.* at 1400.

indifference.[56] The instant decision, then, exposes a fundamental conflict between the utility of using voter registration rolls as source lists and constitutionally guaranteed rights. Although not at issue in *Ford v. Hollowell,*[57] an objectively applied cross-section test also conflicts with valid state interests in juror competency. Further, the court's standard, which requires objective analysis, raises the issue of color-conscious proportionalism. Racial considerations in juror selection, though, do not amount to reverse discrimination. Rather, the approach is similar to that taken in school desegregation cases which recognized that constitutional goals of equal protection are difficult to achieve with color-blind administration of the law. In *King v. Cook*[58] the instant court previously acknowledged this position in holding that voter registration lists, tainted by past official and concurrent societal discrimination, do not produce constitutionally acceptable juries.[59]

Ford v. Hollowell would have created serious problems for state and local officials prior to 1965. By 1970, however, Black voter registration in Mississippi had risen to 71 percent of the voting age population, which compares favorably with a figure of 82.1 percent for Whites.[60] Assuming that Black registration is not decreasing significantly, these figures indicate that the problem of racially discriminatory juror selection is not pervasive throughout the state, but, more probably, is a localized phenomenon. This is not to propose that the instant decision does not merit the attention of both state and local officials, especially if Black underrepresentation is more widespread than expected. County juror commissions should immediately inventory the effectiveness of selection procedures to determine whether juries are being produced which are constitutionally infirm. Current Mississippi statutes[61] require impartial selection from voter registration lists, but do not provide for use of alternative sources or supplementation, if necessary, to achieve fairly representative juror pools. Existing law,[62] then, cannot accommodate the court's holding in *Ford v. Hollowell.* Unfortunately, although voter registration rolls are generally reliable source lists, they

---

[56] Of course, group representation may to some extent be determined by reasonable qualifications and socially permissible exclusions. Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970).

[57] *Ford v. Hollowell* relates to juror competency only insofar as one could argue that persons who assert their right to register are qualitatively distinguishable from those who do not.

[58] 298 F. Supp. 584 (N.D. Miss. 1969).

[59] *Id.* at 587-88.

[60] U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 374 (1972).

[61] MISS. CODE ANN. §§ 13-5-8, -10, -12 (Supp. 1974).

[62] It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court . . . .

Id. § 13-5-2. This policy statement cannot be implemented without supplementation of registration lists, where, as in *Ford v. Hollowell*, local conditions preclude selection system neutrality. Mississippi case law provides for the calling of common law juries when necessary to empanel a constitutional jury. Black v. State, 187 So. 2d 815, 818 (Miss. 1966).

are difficult to supplement efficiently.[63] This problem, however, has received considerable attention.[64] Helpful suggestions do exist and should provide workable alternatives. When rethinking selection proceedings, officials should also consider that discriminatory use of peremptory challenges, age group discrimination, and the loaded effects of class or group juror exemption policies may be subjected to judicial action in the future.

The instant court will soon face the issue of whether *Ford v. Hollowell* should be limited to have a prospective effect only.[65] Traditionally, courts have considered three criteria when making this decision: (1) the purpose of the new standard; (2) reliance by officials on the old standards; and (3) the effect of retrospective application on the administration of justice.[66] The test is essentially a balancing of the severity and probability of actual injury against considerations of efficient court administration. If a substantial number of parties can compile evidence to establish significant racial underrepresentation, there is little question that the standard established in *Ford v. Hollowell*[67] would create a burden on the administration of justice. Equally important, courts must consider the difficulty involved in producing witnesses and evidence necessary to reconvict a successful habeas corpus petitioner. In *Daniel v. Louisiana,*[68] the Court weighed these considerations, as well as the improbability of vindicating constitutional rights, in holding that *Taylor v. Louisiana*[69] should be applied prospectively only. *Daniel,* however, is not good precedent for the instant question. The burden imposed by retrospective application of *Taylor* would have been colossal. While a flood of habeas corpus petitions might be expected to result from the instant court's decision, several countervailing factors should be noted. Black voter registration has reached a level of comparative parity with White.[70] The court's holding may easily be limited,[71] and proof requirements are arduous.[72] Relief would be available only to persons indicted or convicted by

---

[63] Comment, *supra* note 30, at 392-96.

[64] *See, e.g.*, Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. (1969); Comment, *supra* note 43, at 494-98; Comment, *supra* note 30.

[65] Habeas corpus proceedings by their nature (*i.e.* raising mistakes in past trials) would have a retrospective effect unless limited to prospective application. The Court could limit the rule of this case to affect only those trials conducted after the date of the instant decision. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967); Watson v. United States, 484 F.2d 34, 35 (5th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

[66] Stovall v. Denno, 388 U.S. 293, 297 (1967).

[67] If *Ford v. Hollowell* is limited to situations where community repression has created the underrepresentation, the "floodgate" actually opened by the court is not wide.

[68] 95 S. Ct. 704 (1975).

[69] 95 S. Ct. 692 (1975).

[70] See note 60 and accompanying text *supra*.

[71] See note 67 *supra*.

[72] A petitioner must not only show long continued, substantial underrepresentation (which requires a considerable amount of time to compile and in some instances records may be inadequate or unavailable) but also some unacceptable explanation for Black underregistration.

juries chosen from significantly disproportionate source lists[73] who had not pled guility[74] or who had not waived constitutional claims.[75] The burden on administration may also be controlled, to some extent, by the court's exercise of discretion in summarily judging the merits of a particular claim, rather than granting a full hearing to all applicants.[76] Finally, if the successful petitioner has served a substantial portion of his sentence, the state may simply choose to forgo the burden of retrial. The crucial determinant in these cases always has been whether the erroneous standard probably infected the integrity of the fact finding process.[77] Where petit jury discrimination is involved, an unrepresentative or presumably biased jury panel directly impugns the accuracy of a guilty verdict. To deny retrospective application of *Ford v. Hollowell* in these cases would seem unjust. However, if the grand jury is challenged, the probability of an "infected" verdict is greatly decreased. Thus, it would not seem unreasonable to distinguish between the two, limiting grand jury challenges to prospective application only.

Robert Dement Drinkwater

---

[73] Since Black voter registration has risen dramatically since 1965, the majority of persons convicted since approximately 1968 probably faced selection systems which would pass the *Ford v. Hollowell* test.

[74] *See* Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971).

[75] *Compare* Davis v. United States, 411 U.S. 233 (1973), *with* Fay v. Noia, 372 U.S. 391 (1963), *and* Whitus v. Balkcom, 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 343 (1964). The question of waiver is further complicated because the discrimination claim often is not asserted due to counsel's fear that presenting it will prejudice his client's case more than the unconstitutional jury. Whitus v. Balkcom, *supra* at 507; United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir.), *cert. denied*, 361 U.S. 838 (1959).

[76] 28 U.S.C. § 2243 (1970).

[77] Adams v. Illinois, 405 U.S. 278, 280 (1972); Stovall v. Denno, 388 U.S. 293, 298 (1967). In criminal cases, this process also includes a determination of means rea. It is submitted, therefore, that racio-cultural imbalances become especially important.

BOOK REVIEWS

CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES
by F. LEE BAILEY & HENRY B. ROTHBLATT.
Rochester, New York: The Lawyers Co-operative Publishing Company. 1973.
Pp. xxv, 385. $35.00.

*Aaron S. Condon**

> All thieves who could my fees afford
> Relied of my orations,
> And many a burglar I've restored
> To his friends and his relations.[1]

> *Crimes of Violence: Rape and Other Sex Crimes* contains virtually all essential and practical information for the attorney who wants to successfully handle a sex crime case.[2]

When forensic gladiators of the stature of F. Lee Bailey and Henry Rothblatt lend their names to a work offering advice to the practitioner of criminal law, a decent humility must of necessity give the reviewer pause at the threshhold of an adverse review. But the great names having been accorded all due respect, candor compels the crossing of that threshhold while intuition, that dubious adviser, quietly counsels that, on the evidence, Bailey and Rothblatt have themselves contributed little or nothing to this book except their valuable names.

The title *Crimes of Violence* is a misnomer, since the range of sex offenses ostensibly covered includes such distinctly nonviolent crimes as obscenity, prostitution, and homosexuality, along with the various degrees of nonviolent (as well as violent) rape, incest, and sodomy. The misnomer would not be troublesome were the nonviolent offenses included as a kind of bonus with an adequate coverage of the violent aspects of sexual misconduct, but sadly this is not the case. All of the offenses are given the most superficial treatment, in a style reminiscent of but inferior to the well-known encyclopedic texts. Despite pretensions to jurisdictional universality, the documentation of the chapters relating to specific offenses is woefully inadequate and unhelpful, adding virtually nothing to existing and readily available sources.

The discussion of the specific offenses occupies only the final third of the book, and certainly its claim to practicality must rest on its coverage of such topics as "The Fee," "Surrendering Your Client," "Bail," and other chapters

---

*Professor of Law, University of Mississippi.

[1] W. Gilbert, "When I, good friends, was called to the bar" in *Trial by Jury* (music by A. Sullivan).

[2] *Foreword* to F. BAILEY & H. ROTHBLATT, CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES at iv (1973).

dealing with the problems of a criminal defense. In general, however, the investigative and procedural steps in handling sex crimes are not significantly different from those in more humdrum offenses. This cold fact severely limits the ambit of the present work to the area already so often ploughed in other books (especially and commendably, by Professor Anthony Amsterdam;[3] and recently and repeatedly by Bailey and Rothblatt themselves). Questions of adequacy and accuracy aside, this reviewer sees little utility in yet another expensive treatment of this subject.

From the standpoint of adequacy, surely a better effort could have been made than this random hash of oversimplifications. We are solemnly advised in section three that "[s]peed is essential if your client is in police custody. Sex offenders often feel a compulsion to confess." (P. 2). We are enjoined not to "permit the police to limit the time or duration of your interview with your client" (§ 4, p. 3), though nothing is said as to the means of overcoming police intransigence. We are told that "[p]rosecutors do not generally offer their most favorable plea *[sic]* at arraignment. If such a plea *[sic]* is offered, it may be an indication that the prosecutor does not have a strong case against the defendant." (§ 38, p. 31). Whether the offered "plea" is the prosecutor's "most favorable" would seem impossible to determine *a priori,* since experience indicates that each offer made in a bargaining session will be represented by the offeror as his best and final. The difficulty is precisely in knowing when the truly final offer has been made.

In the two pages given for Chapter Two, "The Fee," we are provided with no better guidelines than the following:

> The fee need not be a flat one. It is possible to charge a certain amount if a plea is negotiated prior to trial, a higher amount if trial is required, or a still higher amount for a first appeal.
>
> The fee should . . . reflect your reputation, overhead, and capabilities and the ability of the client or of his family and friends to pay the fee.

(§ 20, pp. 9-10). These unremarkable banalities are followed in section 21 ("Conditioning the client") by a more eye-opening admonition:

> Stress to the client that his reputation and liberty are at stake. He should not allow haggling over money, since this may stand in the way of receiving the best possible defense.

(P. 10). An armed skyjacker could hardly have expressed the underlying philosophy more succinctly.

And note the concluding words of the recommended form of "Surrender Letter" (§ 22), in which the defense attorney assures the prosecutor that, "if I am present to advise him of constitutional rights, Mr. Defendant will answer your question." (P. 27). Since in this situation the only constitutional right involved is the right of "Mr. Defendant" to refuse to answer questions, this

---

[3] TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (2d ed. A. Amsterdam, rep. 1971).

particular promise of cooperation will hardly evoke warm sensations of prosecutorial gratitude.

If the discussion of legal practicalities suffers from oversimplification, a full and overflowing measure of compensation appears when the book turns to the esoterica of chemical analysis. In section 67 (Examination of semen) and section 68 (Examination of blood), the reader finds himself plunged without warning or documentation into a morass of the minutiae of chemotesting. The following paragraph from section 68 is typical:

> When testing a dried stain, a portion of the stain and a portion of the substrate materials are incubated with cells known to be of groups A, B and O. Anti A and Anti B sera and Anti H lecithin are incubated with portions of the suspect substance and substrate. In this process the substrate functions as a control for more specific agglutinins which are present, but are not part of the suspect substance. The O cells function as a control for nonspecific agglutinins. Thereafter, the activity of each anti sera as against the particular cell groups can be determined. Similarly, the absorbed anti sera can be eluded after the suspect substance is washed and the amount of specific absorption of that substance can then be measured.

(Pp. 51-52). Characteristically, and inexcusably, there is no source citation for any of this hypertechnical name-dropping. What use the nontechnician could make of these materials is not even suggested.

Inadequacy of documentation is not confined to nonlegal topics. Except for the chapter on discovery, the documentation is wholly inadequate. Case citations throughout omit the year of the decision, surely a matter of more than academic interest to the serious reader. The absence of a table of case and statutory citations compounds these deficiencies and confirms the impression of hasty composition and inadequate editing otherwise indicated by recurrent lapses in grammar and spelling.

The text contains curious oversights and contradictions. For instance, section 470 tells us that "[s]ince rape is a state crime, the Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable." (P. 306). This statement is plainly wrong. The Supreme Court's 1972 decision in *Furman v. Georgia*[4] was only the last in a long line of cases applying the eighth amendment to the states. Ironically, *Furman* itself involved a conviction for rape. In a footnote to his concurring opinion, Justice Brennan stated specifically:

> The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California,* 370 U. S. 660 (1962); *Gideon v. Wainwright,* 372 U. S. 335, 342 (1963); *Malloy v. Hogan,* 378 U. S. 1, 6 n. 6 (1964); *Powell v. Texas,* 392 U. S. 514 (1968).[5]

The erroneous statement of the law contained in section 470 is timidly but

---

[4] 408 U.S. 238 (1972).

[5] *Id.* at 257-58 n.1.

directly impeached by section 548, which declares that "[s]exual psychopath legislation may be subject to attack on the ground that it calls for cruel and unusual punishment in violation of the United States Constitution." (P. 360). Errors and contradictions of this magnitude leave little room for confidence in the series of which this book forms a part.

Crimes of Violence: Rape and Other Sex Crimes, at best, offers the practitioner an overpriced compendium of generalities, commonplaces, and hypertechnicalities, interspersed with a few forms and checklists that might be moderately helpful to a young attorney involved in his first criminal case. But even here extreme caution is advisable. The recipes in this legal cookbook often lack key ingredients.

THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE
IN CIVIL LAW AND MIXED JURISDICTIONS
Edited by Joseph Dainow.
Baton Rouge: Louisiana State University Press.
1974. Pp. 350. $16.00.

*Stephen Gorove**

The origins of this book may be traced to a lecture by Professor Jean-Louis Baudouin of the University of Montreal delivered in the spring of 1972 on "The Future of Civil Law in a Mixed Jurisdiction" at Louisiana State University and to a number of seminars for Louisiana appellate judges organized by the Institute of Civil Law Studies at the same university.

The synthesis of Professor Baudouin's presentations constitutes the first chapter of the book which addresses itself to the very interesting question of the influence of the common law in mixed jurisdictions, like Louisiana and Quebec, on the development of the civil law. The ensuing three chapters focus on Louisiana and discuss the origin and development of the judge's role (by Albert Tate, Jr.), the rebirth of the civil law tradition (by Mack E. Barham), and analyze judicial decisions and doctrine as sources of law (by A. N. Yiannopoulos). This last essay takes the reader from a mixed jurisdiction to a pure civil law jurisdiction, France, to which the next two chapters on civil law authorities (by Jean Carbonnier) and — what the well-known French scholar, René David, calls — the "Supereminent Principles in French Law" are devoted. The remaining essays describe the role of jurisprudence and doctrine in different countries, including Germany (by Karl Larenz), Italy (by John Henry Merryman), Scotland (by David M. Walker), South Africa (by Ellison Kahn), Israel (by G. Tedeschi, U. S. Zemach, and U. Yadin), and Mexico (by Woodfin L. Butte). A selective bibliography (by Charles Szladits) and a well-prepared index (by Vera Bolgar) complete the study.

The editor of this book, Joseph Dainow, Emeritus Professor of Law and Director of the Institute of Civil Law Studies at Louisiana State University, should be congratulated for compiling contributions by such eminent scholars in a single volume and providing an overview of the place and role of jurisprudence in the light of doctrine in several civil law and mixed jurisdictions.

Understandably, it may be difficult for people trained in one legal system to comprehend and appreciate the intricate workings of another. To some extent, the civilian judge's role may appear to be a puzzle to many lawyers trained in the common law, especially if they examine it not in its historical context but in its present-day complexities. The civilian judge's role may not lend itself to easy generalizations applicable to all civil law countries. It is certainly distinct and has peculiar problems in a mixed jurisdiction, like Louisiana and Quebec, where it cannot escape the influence of what might be called "the surrounding sea" of the common law. It is in this sense that the book brings together, in the common law's language of English, the kaleidoscopic picture of a variety of

*Chairman of the Graduate Program of the School of Law and Professor of Law, University of Mississippi.

different legal systems bound together by the civil law tradition. It should be regarded as a welcome contribution to a field that judges, practitioners, and scholars alike should be interested in understanding.

The Law in America: A History
by Bernard Schwartz.
New York: McGraw-Hill. 1974. Pp. 311. $19.95.

*Michael de L. Landon**

The United States, perhaps more than any other nation in the world today, is a nation where the rule of law prevails. It is desirable, therefore, that American citizens should have some knowledge and understanding of American law, and of the rules and principles, both written and unwritten, that guide the actions and shape the decisions of the lawyers and judges who are its agents and interpreters. Essential to a proper understanding of any institution, of course, is a knowledge of its history. Bernard Schwartz, in *The Law in America*, aims to provide his readers, whether lawyers or laymen, with a basic factual and interpretative account of the development of American law from colonial times to the present; and he does rather a fine job of it.

Now the Edwin D. Webb Professor of Law of New York University, Dr. Schwartz is exceptionally well qualified to interpret the story of their law's history to his fellow Americans. A Harvard LL.M. and a Cambridge University Ph.D., he is the author of more than twenty books dealing with various aspects of British and French, as well as United States, government and law. His five-volume *Commentary on the Constitution of the United States* (1963-68) was hailed as a "classic" by the Lawyers Literary Guild. Having served as a consultant to the Hoover Commission on the Reorganization of the Executive Branch in 1955 and as Chief Counsel and Staff Director in 1957-58 for a House of Representatives special subcommittee on legislative oversight, he has had the practical experience of dealing with legal and government problems at the highest level.

A separate edition of Schwartz's book, "with illustrations, feature articles, and some variation of the text," has been published, simultaneously with the McGraw-Hill monograph edition, as *The American Heritage History of the Law in America*. Obviously, therefore, it is a book intended primarily for the layman rather than the legal scholar. Though the style of writing is a trifle pedantic and overly-scholarly; and although the author is probably overly optimistic in his apparent presumption that all his readers will be familiar with the novels of Charles Dickens; it is well within the comprehension of, and can be read with pleasure by, any college graduate. Landmark decisions, from *Marbury v. Madison* (1803) to *Miranda* (1967) and some even more recent ones, mentioned in the text are briefly summarized for the reader in a very useful, six-page "Glossary of Cases Cited" provided at the end of the book. The abundant notes supplied for each of his nine chapters, citing numerous law reports, works of jurisprudence and historical works, evidence the immense amount of scholarship that the author brought to bear on his topic. A comprehensive bibliography is also provided and a very full and thorough index.

Nevertheless, in spite of all of its scholarly apparatus, Schwartz's is not the book to go to in search of the detailed *minutiae* of American legal history. One

* Professor of History, University of Mississippi.

will search its pages in vain for a description of the development of the rules of evidence or of the evolution of taxation law. Because it is so general in its treatment of its subject it would not really be suitable for use as a text in a course on American legal history.

In his introduction Schwartz tells us that: "the history of American Law is a history of the effort to mold legal institutions and doctrines to meet the felt necessities of each period in the nation's development" (p. xi). As he sees it, American judges and lawyers, with the Supreme Court acting always as the final arbiter, in the past always have succeeded in molding it to meet those needs. The first generation of jurists took the English Common Law inheritance and the newly written Constitution and combined them to create a system able to cope with the problems of a newborn, continent-sized nation. Their pre-Civil War successors translated the principles of Jacksonian democracy into a version of constitutional law that, by removing the heavy burdens of established monopoly and established custom, furthered the growth of corporate enterprise. And after the great war was over, the judges of the "Gilded Age" of the later nineteenth century, by using the "due process" clause of the fourteenth amendment and by emphasizing the principle of freedom of contract, made possible an economic expansion unparalleled in the whole previous history of the world.

It was an expansion achieved, however, at the cost of a great deal of oppression, exploitation, and human suffering. In the 20th century, Schwartz points out, the law has come to be less concerned with the *regulation* of the activities of fiercely competitive, economic free agents and more concerned with the *distribution* of rights and wealth equitably among all citizens and groups of citizens. There is very little criticism voiced today, he notes, of the substantive law itself, but a great deal of complaint is heard about how the law is being administered by lawyers and judges. Nevertheless he continues to be optimistic that the students and practitioners of a system of law that has withstood so many challenges and crises, since it first developed in Angevin England some 800 years ago, can make that system function properly in modern America. Reading the last chapter of his book makes one very much aware of the law's present day problems, but it also moves one to share in his optimism.

We make

Savings

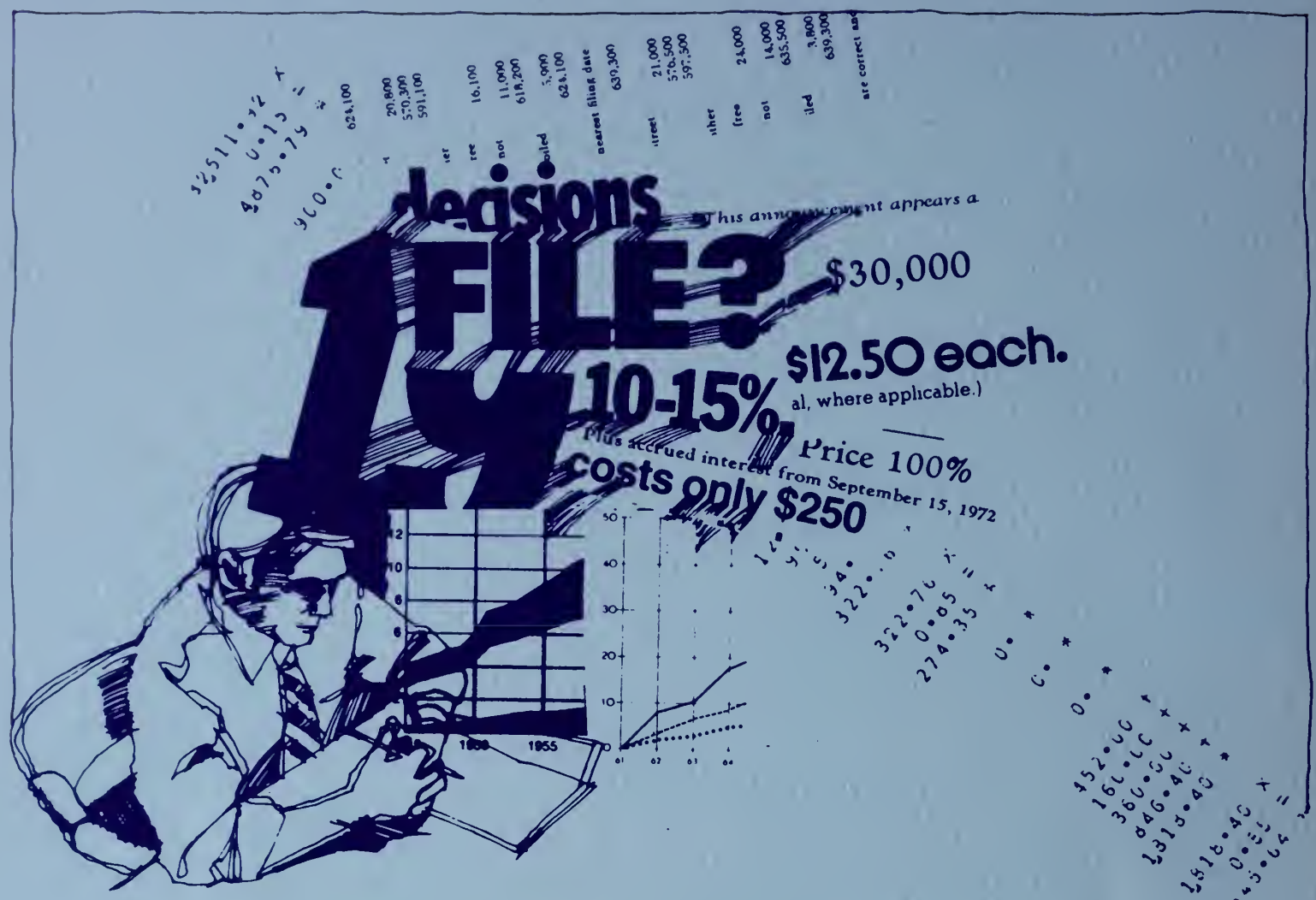
OUR BUSINESS . . .

AND WITH OVER $65,000,000 IN ASSETS WE ARE
BETTER ABLE TO SERVE THE NEEDS OF YOUR
CLIENTS THROUGHOUT NORTH MISSISSIPPI
WITH FIRST MORTGAGE HOME AND
COMMERCIAL REAL ESTATE LOANS OR AS A
LEGAL DEPOSITORY FOR ESTATES,
GUARDIANSHIPS, AND TRUST FUNDS.

Offices in

Batesville * Starkville * Clarksdale
Pontotoc * Cleveland * Senatobia
Ripley * Houston * Oxford * Grenada
New Albany * Hernando * Horn Lake

North Mississippi Savings & Loan Assoc.



Freedom From Financial Worry

That's one of the most important services you can provide your client. In fact, it's what your client really looks to you for.

It's our business, too. Our Trust Department offers sound, professional financial counseling on such matters as retirement plans, estate planning, investment management and other fiduciary services.

These are some of the ways we can work with you and others to provide total estate planning that will free your client from financial worry.

Put your client's trust in us!

First National Bank
Jackson, Mississippi Member FDIC

BRANCHES: Amite County Bank, Gloster/Liberty; Commercial National Bank, Greenville/Leland; First National Bank, McComb; The Bank of Greenwood, Greenwood; Tylertown Bank, Tylertown